have extended the CWA to groundwater. *Id.* at 1325, 27-29 (*quoting* S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971)). Instead, Congress determined that regulation of groundwater be left to the States. *Id.* at 1325-29; *see also Kelley ex rel. Mich. v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985)). Respecting the balance of roles and policy goals that Congress adopted in the CWA is the best way to ensure the existence of strong environmental protection programs at both the State and federal levels. For these reasons, this Court should reverse the lower court's decision.

II. The Hydrological Connection Theory Dramatically Increases State Regulatory and Compliance Costs and Creates New, Unanticipated Costs for Regulated Parties.

This Court should not adopt an atextual theory of federal CWA jurisdiction that is certain to drastically increase the cost of States' administration, regulation, enforcement of the NPDES program as well as the costs of citizen and business compliance with the CWA and NPDES program. Initially, expanding CWA liability to groundwater would immediately force States to undergo massive expansion of NPDES programs beyond discharges from "discrete conveyances" to the entire network of underground capillaries that ultimately lead to "navigable waters," or else risk losing their authority to issue NPDES permits altogether. *See* 33 U.S.C. § 1342(c)(3). Next, expanding the NPDES permitting regime would strap the States' environmental protection resource. Finally, the hydrological connection theory

would dramatically increase the number of regulated individuals and business and their CWA and NPDES compliance costs.

Simply put, the adoption of the hydrological connection theory would cause a radical and impracticable expansion of States' NPDES permitting programs. NPDES permits issued by authorized state agencies contain precise discharge limits from specific point sources into covered water. Compliance with the terms of a permit is the prerequisite for avoiding liability. *See*, *e.g.*, 33 U.S.C. §§ 1311(a), 1342. But the degree of precision necessary to draft permits with clear compliance requirements would be nearly impossible to replicate with respect to groundwater discharges. States would be forced to issue permits for any flows, seeps, or fissures, including those that are hidden and malleable. The trajectory and speed of groundwater flow depends on geography and gravity, not design. These factors would make it extremely difficult to draft a permit with precise discharge parameters or monitor compliance or seepage.

The struggle to regulate this radically expanded realm of CWA permitting would place an untenable strain on the environmental protection resources of the States. At present, the time and costs for States to administer NPDES permitting programs and otherwise satisfy the requirements of the CWA already require an estimated \$83 million in annual labor costs and 1.8 million hours per year. *See* EPA ICR Supporting Statement, Information Collection Request for National Pollutant

Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-0004, EPA ICR No. 0229.22 at 23 tbl. 12.1 (Sept. 2017).

In addition to the hundreds or thousands of new permitting applications, States would, at a minimum, be forced to undertake significant environmental impact studies of the many newly covered sources of pollution in order to develop data sufficient to regulate with any degree of precision, coherence, and conformity with established scientific principles. States would also necessarily be required to expand the extent and applicability of their respective water quality standards ("WQS") to cover groundwater. See 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. §§ 130.3, 131.3(i), and 131.4(a). Such a result would expand States' duties to revise WQS or require them to issue altogether new WQS. See 33 U.S.C. §§ 1313(c)(3); 1315(b)(1)(A)-(B). Moreover, States could not simply decline to undertake these burdensome costs. Instead, if a State chose not to extend its permitting programs to include the addition of pollutants to "groundwater," it would immediately risk EPA revocation of its authority to issue NPDES permits altogether. See 33 U.S.C. § 1342(c)(3). Ultimately, this theory of CWA jurisdiction would require States to devote astronomical resources from already strained budgets.

Finally, the hydrological connection theory would dramatically increase the number of regulated parties and their compliance costs. The "systemic consequences" of the CWA can be "crushing" "to landowners for even inadvertent

violations." *Hawkes*, 136 S.Ct. at 1816 (Kennedy, J., concurring). For example, owners of large parking lots could find themselves subject to CWA citizen suits as storm water runoff mixes with petroleum products discharged by cars parked on pavement, and may make its way into groundwater and eventually "navigable water." The same logic extends to runoff from state, county, and municipal roads and highways. As all groundwater may eventually migrate to navigable waters, individuals and companies will likely find it prudent to seek NPDES permits for essentially every discharge that might find its way to groundwater, resulting in the imposition of immense compliance costs on regulated parties. As the Supreme Court has recently emphasized, the NPDES permitting process is "arduous, expensive, and long." U.S. Army Corps of Engineers v. Hawkes Co., 136 S.Ct. 1807, 1815 (2016). In sum, the lower court's adoption of the hydrological connection theory would cause CWA and NPDES compliance costs to skyrocket for both individuals and businesses. As a result, this Court should reverse the lower court's decision.

III. Extending the CWA's Scope Is Unnecessary.

This Court should not adopt an unnecessary, atextual theory of federal CWA jurisdiction in light of other state and federal laws that provide adequate, alternative methods for addressing groundwater pollution. The NPDES structure is ill-suited to regulate discharges into groundwater, as explained above, but there are numerous federal and state programs that are better tailored to address groundwater pollution.

These existing laws and programs render the extension of CWA jurisdiction to hydrologically connected groundwater unnecessary. *See Catskill Mountains v. Ch. of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 529 (2d Cir. 2017) (finding narrower interpretation of CWA reasonable in part because "several alternatives could regulate pollution . . . even in the absence of an NPDES permitting scheme").

Several other federal statutes provide the federal government authority to regulate the migration of pollutants through groundwater. For example, the Resource Conservation and Recovery Act ("RCRA") provides the government the power to bring suits and criminal actions against persons who dispose of solid or hazardous waste, past or present, which "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(2). Indeed, the EPA has exercised its authority under RCRA to regulate the disposal of solid waste by promulgating a rule establishing minimum national standards for the disposal of coal combustion residuals ("CCR") generated by electric utilities and independent power producers, like the pollutants at issue in this case. See Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015), 2010 WL 2470432 ("CCR Rule"); 40 C.F.R. 257.50-257.107. Under the Rule, any existing unlined CCR surface impoundment that is contaminating groundwater above a groundwater protection

standard established by the EPA must stop receiving CCR and either retrofit or close, except in limited circumstances. 40 C.F.R. § 257.71; *id.* § 257.101.

In addition, The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") grants federal authority to order removal of pollutants or other remedial action whenever any "hazardous substance is released or there is a substantial threat of such a release into the environment." 42 U.S.C. § 9604(a)(1). Unlike the CWA, CERCLA provides authority to remediate "release of pollution" into "environment," expressly including the "navigable waters" and "any other surface water, ground water, drinking water supply, land surface, or subsurface strata, or ambient air within the United States." 42 U.S.C. § 9601(8) (emphasis added). Had Congress intended the CWA to include ground water it would have explicitly said so, as it did under CERCLA.

Moreover, States have long exercised their power to protect intrastate waters and groundwater independent of the CWA NPDES permitting program. Tennessee law, for example, directly addresses the discharge of pollutants into groundwater by rendering it "unlawful for any person to discharge any substance into the waters of the state" where such substances qualify as statutorily defined pollutants and the discharge was not "properly authorized" by state authorities. T.C. § 69-3-114(a); T.C. § 69-3-103 (defining "pollutant"). This prohibition clearly encompasses the discharge of pollutants into groundwater, because the applicable statutory definition

of "waters" includes "any and all water, public or private, on or *beneath the surface* of the ground, that are contained within, flow through, or border upon Tennessee." T.C. § 69-3-103 (emphasis added). Other States in this Circuit enforce similar laws, including—but not limited to—the following:

- Kentucky law provides that "no person shall, directly or indirectly . . . discharge into any of the waters of the Commonwealth . . . any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth" except as authorized by state regulatory authorities." KRS § 224.70-110; KRS § 224.1-010 (defining "waters" and "waters of the Commonwealth" to include "underground water").
- Michigan law provides that a "person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious" to a broad array of interests, including public health, commercial, industrial and agricultural land uses, and the protection of wild flora and fauna. M.C.L. 324.3109(1). The term "waters of the state" is explicitly defined to include "groundwaters . . . within the jurisdiction of this state." M.C.L. 324.3101(aa).
- Ohio law makes it unlawful for any person to "cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state." R.C. § 6111.04(A)(1); R.C. § 6111.01 (defining "waters of the state" to include all "bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located . . . except those private waters that do not combine or effect a junction with natural surface or underground waters").

In sum, state and federal laws already provide important regulatory checks on groundwater pollution. At best, the hydrologically connected groundwater theory is an expensive, atextual, redundancy. As a result, this Court should respect the

jurisdictional limitations embodied in the text of the CWA and reverse the lower court's decision.

IV. The Lower Court's Order Would Impose Substantial Costs on Utility Customers

A. The Impact to Customers Is Immediate and Profound.

Just like any other utility with regulated rates, the TVA generally passes its costs on to consumers.² While the specific type of costs that utilities experience may vary, the broad categories of costs the TVA incurs are typical of the industry, and include "[o]peration, maintenance and administration of the utilities' power system; taxes or in lieu of tax payments; and, capital costs such as debt service payments."³

Over the past few decades, utilities have spent an increasing amount of capital on environmental compliance. For instance, "[f]rom the 1970s to 2017, TVA spent approximately \$6.7 billion on controls to reduce emissions from its coal-fired power plants." The bulk of environmental compliance costs are attributable to government mandates and sweeping regulatory changes, such as the implementation of the Clean

² The TVA board has some discretion in determining when costs are recovered through rates, but generally, the TVA sets its rates at levels that will recover its costs. TVA 10-K For the fiscal year ended Sep. 30, 2017 ("TVA 2017 10-K"), at 11-12, accessible

https://www.sec.gov/Archives/edgar/data/1376986/000137698617000031/tve-09302017x10k.htm

 $^{^3}$ Id.

⁴ *Id.* at 32-33.

Water Act and Clean Air Act, or standards for Sulfur Dioxide or Nitrogen Oxides. For example, in 2011 the TVA initiated a project at the Gallatin Plant to install a dry flue gas desulfurization control ("dry FGD") to the tune of \$730M, wherein, "[t]he Project allowed TVA to reduce the plant's sulfur dioxide and nitrous oxide emissions into the air." When a utility spends significant sums for the purpose of regulatory compliance, the expenses are typically passed on to consumers. When provided with two reasonable options like in this matter — deciding between whether to close-by-removal or close-in-place a coal ash pond — a utility's decision will generally be reflected on customers' bills for decades to come.

The remedy provided by the lower court much more expensive than the alternative remedy. The TVA's preferred option of addressing the future of the Gallatin ash ponds—and an option specifically authorized by the EPA's CCR rule—is a process referred to as closure-in-place. The estimated cost of closure-in-place, as provided to TDEC, is \$230 million.⁶ This is in stark contrast to the remedy ordered by the lower court (and advanced by the Appellees) of the "excavation and offsite relocation of CCR Material," costing approximately \$2 billion.⁷ Should this remedy

⁵ Trial Tr. (Vol. 4), RE 237, PageID#9513.

⁶ Trial Tr. (Vol. 4), RE 237, PageID#9520.

⁷ *Id.*

be upheld, the cost to TVA's customers for this project alone will likely be nearer to \$4 billion when considering the cost of debt.⁸

B. If this Remedy in this Case Is Upheld and Applied to Additional TVA Sites, the Cost will be Unduly Burdensome to Customers.

If the hydrological connection theory becomes binding in this Circuit, these costs will dramatically increase. Additional citizen suits will almost certainly follow, likely resulting in closure-by-removal of most, if not all, of the coal ash ponds operated by the TVA. The ratepayer impact of this broad reading and implementation of the CWA, together with the burdensome remedy and subsequent application to other impoundments, would lead to unaffordable bills for many TVA customers. For instance, the cost estimation information provided by the Part II EIS programmatic review, an environmental impact and cost study conducted for the TVA, of ten (10) other wet ash-handling facilities at six (6) additional TVA fossil fuel sites, suggests that if those facilities were closed-by-removal, rather than closed-in-place, the *net* difference in cost would be roughly \$2.7 billion, before considering financing costs.⁹

⁸ Calculated assuming a 30-year amortization period and a debt rate of 4.75%, which is conservative compared to the TVA's 2017 blended interest rate of 5.11%, TVA 2017 10-K, at 61, 30 years was used as the amortization period as it is generally the

^{2017 10-}K, at 61. 30 years was used as the amortization period as it is generally the ordinary length of time in which large, long-term debts are borrowed and to reflect the anticipated length of ash pond closure-by-removal for Gallatin (24 years), See

Proposed Compliance Timetable, RE268, PageID#10883.

⁹ To simplify, the amounts used were those provided for the closure-by-removal (truck) option in the Part II-Programmatic Reviews.

Coupled with the *net* difference between the costs of the two options at the Gallatin facility, and including financing costs, the estimated cost to TVA customers if the utility is forced to close-by-removal fourteen (14) of its twenty-two (22) total coal ash facilities is more than \$8,500,000,000. This estimate does not include the eight (8) ash impoundments that do not have Part II EIS reviews or are part of this litigation. If the other eight (8) ash impoundments are considered, the *net* cost to TVA customer for the closure-by-removal remedy vs. closure-in-place is likely in excess of \$10,000,000,000. Importantly, the TVA currently has outstanding debt in excess of \$20 billion, while the TVA Act only authorizes the TVA to issue bonds in an amount not to exceed \$30 billion at any time. Similar citizen suits and the imposition of same remedy as the underlying matter could ultimately devastate TVA's financial position, putting the future of millions of American's energy supply at risk.

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Page 6 of Part I-Programmatic NEPA Review, available at https://www.tva.com/file_source/TVA/Site%20Content/Environment/Environment-al%20Stewardship/Environmental%20Reviews/Closure%20of%20Coal%20Combustion%20Residual%20Impoundments/Final%20EIS%20Part%20I.pdf.

¹¹ See TVA 2017 10-K, at 112-113; See also TVA Act, at 20, available at https://www.tva.com/file_source/TVA/Site%20Content/About%20TVA/TVA_Act.pdf

In 2016, Kentucky customers represented approximately 6.5% of the total kWh's sold by TVA. 12 Thus, it is reasonable to assume that Kentucky customers would be liable for approximately 6.5% of the \$8,500,000,000 net cost associated with the closure-by-removal remedy (rather than closure-in-place) for fourteen (14) of TVA's ash impoundments - or \$550,000,000. Assuming those costs are recovered on a levelized basis over 30 years¹³, the cost of this *single issue* will lead to residential customers in Kentucky paying \$5,000,000 more a year. ¹⁴ This increase to Kentucky customers provides them no corresponding benefit. These customers do not live in a State where any of the fourteen (14) referenced impoundments are located, while those in Kentucky who live near the Cumberland River are hundredsof-miles upstream from the Gallatin plant. Any perceived safety or environmental benefits that may be claimed by the Appellees as a result of the ordered remedy will be of little assistance to those 200,000 Kentucky households that will see their bills rise more than necessary than if the TVA closes-in-place its ash ponds. When considering the effect on customers of closing-by-removal all TVA ash

TVA at a glance website and TVA in Kentucky website, 2016 figures, available at https://www.tva.com/About-TVA/TVA-at-a-Glance and

https://www.tva.com/About-TVA/TVA-in-Kentucky.

13 See footnote 9 stating that the assumed amortization period is 30 years.

¹⁴ \$ 8.5 billion*6.5%=\$552,500,000

^{\$ 552,500,000/30} years= \$18,416,667

^{\$ 18,416,667*.2745 (%} of total 2016 Ky. kilowatt-hours represented by residential customers)= \$5,055,375

impoundments, as opposed to closure-in-place, the remedy ordered by the lower court appears to be even more unreasonable.

If similar citizen suits, demanding the same draconian remedy for every impoundment, are applied across the Sixth Circuit additional consumers will suffer. Kentucky, like the others states in the Sixth Circuit, has dozens of ash impoundments. If the lower court's interpretation of law and the applied remedy are upheld in this matter, similar citizen suits will undoubtedly follow. Due to the rateregulated nature of most States' utilities, the consequence of these suits and subsequent mandated remedy of closure-by-removal, will without question lead to increased rates for consumer. For legal precedent based on limited evidence to mandate that utilities close-by-removal all ash impoundments, regardless of whether that method is the most reasonable, will ultimately lead to unaffordable and burdensome utility rates. Using the estimated size of the ash impoundments in Kentucky, and extrapolating the cost estimated in TVA's programmatic reviews, the costs that will be passed onto customers within the Sixth Circuit alone will be tensof-billions of dollars. Along with the inappropriate interpretation of the CWA, the remedy the lower court ordered is an unreasonable application of the CWA to these facts, and the precedent it sets for the rest of the States within the Circuit is untenable for customers. Reasonable minds can differ among stakeholders as to the most prudent long-term plans for these impoundments, and under cooperative federalism

every stakeholder has an opportunity in the process to voice those concerns. If upheld, customers across the Circuit will be paying for the preference of those citizens who have strong opinions regarding environmental issues – not what the most reasonable outcome should be.

Consumers in Mississippi, Georgia and Alabama all receive service from, and pay rates to TVA, although they are located outside of the Sixth Circuit. As a consequence of this matter, and any others where TVA may be *forced* to close its ash impoundments by removal under an unreasonable application of the CWA, customers in those States will pay their portion of the costs, just like residents of the Sixth Circuit States. These States are not within the footprint of the Sixth Circuit, but those consumers will nevertheless be burdened with any negative consequences of the district court's decision. In fact, the Fifth Circuit, in which Mississippi is located, has already rejected similar arguments under the CWA as those before us. Thus, although the federal courts in their State and Circuit have rejected the legal arguments made by Appellees here, consumers may nevertheless pay for a contradictory decision from a different Circuit.

¹⁵ See Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the District Court.

ANDY BESHEAR

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CERTIFICATE OF COMPLIANCE

This document complies with the length limit of Fed. R. App. P. 1.

29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P.

32(f) and Fed. R. App. P. 27(a)(2)(B), this document contains 5015 words.

This document complies with the typeface requirements of Fed. R. App. 2.

P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this

document has been prepared in a proportionally spaced typeface using Microsoft

Word 2016 in 14-point Times New Roman.

Dated: February 6, 2018

/s/ Eric M. Palmer

Eric M. Palmer

Ala. Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on February 6, 2018, I electronically filed this document using the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

/s/ Eric M. Palmer
Eric M. Palmer
Ala. Assistant Solicitor General

From: Maierhofer, Justin C [jcmaierhofer@tva.gov]

Sent: 2/1/2018 4:32:44 PM

To: Ross, David P [ross.davidp@epa.gov]

Subject: Brief

Attachments: Brief of Defendant-Appellant TVA, No. 17-6155 (6th Cir.) (as filed Jan.pdf

Hey David, hope you're doing well and getting settled in there at EPA. I wanted to make sure you had a copy of TVA's appellate brief filed earlier this week.

Don't hesitate to reach out if we can answer questions or provide you with an update.

Thanks-Justin

Justin Maierhofer

Vice President Government Relations

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From: Maierhofer, Justin C [jcmaierhofer@tva.gov]

Sent: 2/8/2018 6:35:18 PM

To: Ross, David P [ross.davidp@epa.gov]
Subject: FW: FYI - State AG Amicus Brief

Attachments: Document.pdf

David,

Just keeping you updated on the amicus brief filed by 17 states plus the Mississippi Dept of Environmental Quality this week. Don't hesitate to reach out if we can be of assistance.

Justin

From: Lieberman, Paige [Lieberman.Paige@epa.gov]

Sent: 10/4/2018 9:05:11 PM

To: Bulleit, Kristy [kbulleit@hunton.com]; Ross, David P [ross.davidp@epa.gov]

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Hi Kristy – I believe that is correct, but let me double check.

From: Bulleit, Kristy [mailto:kbulleit@hunton.com]

Sent: Thursday, October 04, 2018 4:18 PM

To: Ross, David P <ross.davidp@epa.gov>; Lieberman, Paige <Lieberman.Paige@epa.gov>

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Actually, it looks like you got over 58,000 comments total. Does that sound right?

From: Bulleit, Kristy

Sent: Thursday, October 04, 2018 3:38 PM

To: David Ross (ross.davidp@epa.gov); Lieberman, Paige

Cc: Bulleit, Kristy

Subject: FW: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Importance: High

Dave and Paige, here's a question for you. By our calculations, EPA received about 900 unique (non-mass mail) comments on the FRN regarding discharges via groundwater, and over 53,000 total comments. Do those stats sound right to you?

From: Bulleit, Kristy

Sent: Thursday, October 04, 2018 2:17 PM

To: 'Fleischli, Steve'; David Ross (ross.davidp@epa.gov); Brooks M. Smith (brooks.smith@troutmansanders.com);

Lieberman, Paige

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com); Bulleit, Kristy

Subject: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Importance: High

Steve, thanks for sending in your paper. Brooks, we look forward to seeing yours too.

Consistent with Steve's suggestion, I've revised the list of WOTUS questions by consolidating two of them. I've taken out the bonus question, which we clearly won't have time to address. As you prepare, please keep in mind the time limits I've assigned. I won't have a hook or a buzzer, but I reserve the right to move the proceedings along to make sure everyone gets a fair chance to say his piece.

I've also taken a stab at a question or two on a couple topics suggested by Steve and Brooks. I've aimed them at primarily at those two speakers, with the thought that I would ask Dave for any comments or reactions to their thoughts by way of closing. Please let me know what you think.

Oct. 19, 10:30-noon

10:30 Bring session to order, brief overview and section announcements, introduction of speakers (Kristy, 10 minutes max)

10:40 <u>Topic 1</u>: WOTUS (30 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (3 minutes max)

Question 1 (for Dave Ross): Dave, can you give us a brief overview of where EPA stands in its effort to reassess and, potentially, revise the 2015 WOTUS rule, and what key issues it is targeting? (5 minutes)

Question 2: Panelists, what, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? And, in particular, how should the Supreme Court's views on Congressional line drawing inform any rule? (proposed order: Steve, Brooks, Dave). (22 minutes total, 7 minutes apiece)

Questions: 5 minutes

11:15 <u>Topic 2</u>: Discharge to surface water via hydrologically connected groundwater (25 minutes of presentation, 9 minutes of questions or discussion among panelists)

Kristy: 1 minute set up

Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? **(8 minutes)**

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean Water Act permitting requirements, although the specific tests applied by the courts differ. We'd be interested to hear your views on the practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received ___ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score.] (8 minutes)

Questions: 9 minutes

11:44 <u>Topic 3</u>: The Heart of the Matter: Recent Developments in the Debate Over how Best to Attain Our Water Quality Goals

Kristy - 1 minute set up

Question 1: Steve, whether and how to regulate storm water pollution has been the focus of a debate for decades. One important component of that larger question is which sources ought to be subject to the CWA's NPDES permit program. A recent decision from the Northern District of California, in a case brought by the LA Riverkeeper, suggests that EPA may have an obligation to exercise its "residual designation" authority to require NPDES permits once EPA has determined that a source or class of sources is responsible for impairing water quality or is a significant contributor of pollutants. Could you comment on the implications of that case? In particular, we'd be interested in your views about whether, if EPA decides it must proceed with an RDA, it must first provide notice and an opportunity for public comment on the underlying determination and, if it does, whether other issues (such as questions about whether or not the sites qualify as point source) are likely to arise. (8 minutes)

(2) Brooks, a wave of litigation starting in the late 1980s prodded EPA and the States ramp up their efforts to identify impaired waters and establish TMDLs to designed bring those waters into attainment with applicable water quality standards. In many cases, the TMDL process represents the first instance in which the state and federal regulators have really considered how much pollutants are being added by nonpoint and point sources, including naturally occurring sources, and what it will take to achieve applicable WQS. Tell us a little about the kinds of issues that can arise in the course of that process. **(7 minutes)**

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Kristy Bulleit

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From: Bulleit, Kristy [kbulleit@hunton.com]

Sent: 10/4/2018 8:31:44 PM

To: Fleischli, Steve [sfleischli@nrdc.org]; Ross, David P [ross.davidp@epa.gov]; Brooks M. Smith

(brooks.smith@troutmansanders.com) [brooks.smith@troutmansanders.com]; Lieberman, Paige

[Lieberman.Paige@epa.gov]

CC: Steinbauer, Gary (GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt

Perfect! Thanks so much, Steve.



Kristy Bulleit

Partner

kbulleit@HuntonAK.com p 202.955.1547 bio | vCard

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From: Fleischli, Steve [mailto:sfleischli@nrdc.org] **Sent:** Thursday, October 04, 2018 4:30 PM

To: Bulleit, Kristy; David Ross (ross.davidp@epa.gov); Brooks M. Smith (brooks.smith@troutmansanders.com);

Lieberman, Paige

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com)

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Kristy,

Below, please find a couple more thoughts on the questions, particularly in light of the Sixth Circuit cases that Brooks' paper addresses. We definitely should acknowledge those new authorities and how they all play in the mix. + a few other edits.

Steve

From: Bulleit, Kristy <kbulleit@hunton.com> Sent: Thursday, October 4, 2018 11:17 AM

To: Fleischli, Steve <sfleischli@nrdc.org>; David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; Brooks M. Smith (brooks.smith@troutmansanders.com) <brooks.smith@troutmansanders.com>; Lieberman, Paige

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Questions: 5 minutes

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Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean Water Act permitting requirements, although the specific tests applied by the courts differ. Meanwhile, the Sixth Circuit recently concluded otherwise. We'd be interested

to hear your views on these cases and on the important differences that now divide the circuits. practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

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Questions: 9 minutes

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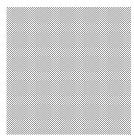
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Sent: 10/4/2018 7:36:15 PM

To: Smith, Brooks M. [Brooks.Smith@troutman.com]; Steinbauer, Gary (GSteinbauer@babstcalland.com)

[GSteinbauer@babstcalland.com]; 'Fleischli, Steve' [sfleischli@nrdc.org]; Ross, David P [ross.davidp@epa.gov];

Lieberman, Paige [Lieberman.Paige@epa.gov]

CC: Nunnally, Heidi M. [Heidi.Nunnally@troutman.com]

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt

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Kristy Bulleit

Partner

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Sent: Thursday, October 04, 2018 2:56 PM

To: Bulleit, Kristy; Steinbauer, Gary (GSteinbauer@babstcalland.com); 'Fleischli, Steve'; David Ross

(ross.davidp@epa.gov); Lieberman, Paige

Cc: Nunnally, Heidi M.

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

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Brooks M. Smith

troutman sanders Direct: 804.697.1414

brooks.smith@troutman.com

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To: 'Fleischli, Steve' <sfleischli@nrdc.org>; David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; Smith, Brooks M.

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Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com) < GSteinbauer@babstcalland.com>; Bulleit, Kristy

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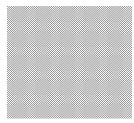
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Sent: 10/4/2018 6:55:52 PM

To: Bulleit, Kristy [kbulleit@hunton.com]; Steinbauer, Gary (GSteinbauer@babstcalland.com)

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WHAT'S THE POINT? EVOLVING CONCEPTS OF LIABILITY FOR DISCHARGES UNDER THE CLEAN WATER ACT

Brooks M. Smith¹

Abstract

Long-established theories of permitting obligations and liabilities under the Clean Water Act are up for grabs in at least five cases wending their way through the federal court system. The decisions rendered to date mark a distinct split in the circuits, making Supreme Court review almost inevitable.

This paper explores the underlying statutory theories, summarizes the recent decisions from the Fourth, Sixth and Ninth Circuits, and offers perspective on potential judicial, legislative and administrative pathways to resolution.

Introduction

One of the bedrock principles of permitting – and liability – under the Clean Water Act ("CWA") is that there must be (1) a discharge (2) *from* a point source (3) *to* navigable waters. As straightforward as that may seem, calendar year 2018 marked the convergence of multiple cases in multiple federal circuits with conflicting decisions on this principle that likely will end up before the U.S. Supreme Court for ultimate resolution. At least four circuit court rulings address the "*from*" and "*to*" with two decisions supporting liability for indirect discharges into groundwater than later reach navigable waters and the other two rejecting such liability. And the fifth ruling addresses head on the need for a "conveyance," regardless of whether the discharge is direct or indirect.

For CWA practitioners, these rulings threaten to either dramatically expand or confine the scope of CWA permitting and liability, and thus bear close and sustained attention.

Statutory Background

Under CWA Sections 301 and 402, the discharge of pollutants is illegal without a permit.² "Discharge of pollutants" is defined to mean "any addition of any pollutant to navigable waters from any point source . . ." "Point source" is defined to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well,

¹ Partner in the Environment and Natural Resources Section of Troutman Sanders LLP, in Richmond, Virginia.

² 33 U.S.C. §§ 1311(a) and 1342(a), respectively.

³ 33 U.S.C. § 1362(12).

discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."⁴

While "addition," "pollutant" and "navigable waters" are all key terms in the definition of "discharge of pollutants," recent cases have focused on the seemingly innocuous connectors "to" and "from," as well as what constitutes a "point source."

The National Pollutant Discharge Elimination System ("NPDES") permit program governs the discharge of pollutants from regulated "point sources," such as municipal wastewater treatment plants and industrial facilities. NPDES permit are designed to impose technology- and water quality-based limits on the amount of pollutants that can be discharged and assign monitoring requirements for permittees to determine compliance with those limits. Typically, those requirements include direct monitoring and measurement of the discharge at the "end of the pipe" (meaning at the point of discharge).⁵

The NPDES permit program has grown and evolved considerably over the past 40 years and now encompasses more than 1,000,000 regulated dischargers engaged in a variety of different activities, including traditional municipal and industrial wastewater treatment plants, construction stormwater, industrial stormwater, municipal separate storm sewer systems, vessels, pesticide applicators and confined animal feeding operations.

As a general matter, the NPDES permit program focuses on discharges from defined outfalls directly to surface waterbodies. These are classical NPDES point sources. However, in some situations, pollutants may enter surface waters indirectly (e.g., from migration of pollutants into and through groundwater). These situations are the catalyst for the recent lawsuits discussed in this paper.

Recent Decisions

a. Hawaii Wildlife Fund v. County. of Maui, 886 F.3d 737 (9th Cir. 2018)

In *Maui*, the defendant discharged treated wastewater into underground injection wells regulated under the Safe Drinking Water Act ("SDWA"). Once injected into the wells, the wastewater would migrate through groundwater to the ocean. At trial, the amounts and pathways for this migration were disputed, but the fact that some wastewater reached the ocean through groundwater was not. The plaintiffs relied on tracer dye studies conducted by EPA in 2013 to show that there was a hydrologic connection between the injected wastewater and the ocean.

The district court ruled in favor of plaintiffs on summary judgment, finding that (1) the defendant "indirectly discharge[d] a pollutant into the ocean through a groundwater conduit," (2) the groundwater is a "point source" under the CWA, and (2) the groundwater is a "navigable water" under the CWA. *Haw. Wildlife Fund v. Cty. Of Maui*, 24 F. Supp. 3d 980, 993, 999 and 1005 (D. Haw. 2014).

-

⁴ 33 U.S.C. § 1362(14).

⁵ See 40 C.F.R. §§ 122.44(i) and 122.48. See also Froebel v. Meyer, 217 F.3d 928, 937 (7th Cir. 2000).

On appeal, the Ninth Circuit affirmed liability but applied a different test than the district court. Instead of ruling that "liability under the [CWA] is triggered when pollutants reach navigable water, *regardless of how they get there*" (as the district court concluded), the Ninth Circuit ruled that the defendant was liable under the CWA because (1) it discharged pollutants from a point source, (2) the pollutants were fairly traceable from the point source to a navigable water such that the discharge was the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching the navigable water were more than *de minimis*. 886 F.3d at 749 (emphasis in original) (citation omitted).

In establishing this "fairly traceable" test, the Ninth Circuit rejected the test proposed by EPA in an *amicus* brief, pursuant to which a "direct hydrological connection" between the point source and the navigable water would be enough to impose liability under the CWA. *Id.* at 749 n.3.

Importantly, in *Maui*, neither side disputed that the underground injection wells constituted a "point source" under the CWA. According to the Ninth Circuit, "[g]iven the wells here are 'discernible, confined and discrete conveyance[] ... from which pollutants are ... discharged,' and the plain language of the statute expressly includes a 'well' as an example of a 'point source,' the [defendant] could not plausibly deny the wells are 'point source[s]' under the statute." *Id.* at 744 (quoting *Trs. for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)).

Instead of "point source," the dispute focused on the terms "to" and "from" in the statutory definition of "discharge of pollutants." Defendant argued that the point source itself must convey the pollutants *directly* into the navigable water, instead of *indirectly* into groundwater that then flows to navigable water. But the Ninth Circuit disagreed, finding support for the indirect discharge rationale in Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715, 743 (2006).

According to the Ninth Circuit, "[a]t bottom, this case is about preventing [defendant] from doing indirectly that which it cannot do directly. [Defendant] could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA's prohibitions."

The defendant petitioned for writ of certiorari on August 27, 2018, and the Supreme Court is expected to decide whether to accept the petition in late October. In support of certiorari, the defendant argues (among other things) that the Ninth Circuit's radical expansion of the NPDES permit program violates the "clear statement" rule enunciated in *Util. Air. Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (this Court "expect[s[Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" such as "[t]he power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide.").

b. *Upstate Forever v. Kinder Morgan Energy Partners, LP*, 887 F.3d 637 (4th Cir. 2018)

In *Kinder Morgan*, the defendant experienced a rupture in its pipeline that caused gasoline to spill into the soil and groundwater and then migrate into neighboring surface water. The defendant fixed the rupture and initiated remediation of the spill under state oversight but nonetheless became the target of a citizen lawsuit under the CWA for indirectly discharging pollutants to groundwater with a direct hydrological connection to surface water without an NPDES permit.

The district court dismissed the lawsuit for lack of subject matter jurisdiction because the pipeline had been repaired and the pollutants passed through groundwater before reaching surface water. But the Fourth Circuit reversed and remanded, accepting the "direct hydrological connection" rationale and also ruling that the violation was ongoing (even though the pipeline had been repaired).

According to the Fourth Circuit, "the CWA is not limited to discharges of pollutants 'directly' from the point source to navigable waters" as long as "the connection between a point source and navigable waters [is] clear." *Id.* at 648, 651 (citing *Maui*). Applying EPA's "direct hydrological connection" rationale, the court ruled that the "determination necessarily is fact-specific" but was amply supported in *Kinder Morgan* because the rupture was just 1,000 feet from navigable waters and there was no dispute that the gasoline was coming from anywhere else. *Id.* at 651-52.

Like *Maui*, neither side in *Kinder Morgan* disputed that the pipeline constituted a "point source" under the CWA. According to the Fourth Circuit, the pipeline "unambiguously qualifies as a point source." *Id.* at 647. However, Judge Floyd, writing in dissent, argued that "[o]ngoing migration from a site contaminated by a past discharge does not involve a point source and is thus not a cognizable violation under the CWA." *Id.* at 661.

The defendant petitioned for writ of certiorari on August 28, 2018, and the Supreme Court is expected to decide whether to accept the petition in late October (on the same timeline as *Maui*). In support of certiorari, the defendant argues (among other things) that the CWA does not apply to discharges to soil or groundwater and that such discharges constitute nonpoint source pollution for which states have primary responsibility (separate and apart from the NPDES permit program).

c. Tennessee Clean Water Network v. Tennessee Valley Authority, No. 17-6155, 2018 U.S. App. LEXIS 27237 (6th Cir. Sept. 24, 2018)

In *TVA*, the lawsuit targeted seepage of pollutants from coal ash impoundments at a power station (the same basic fact pattern as *Kentucky Utilities* and *VEPCO*). After a bench trial, the district court imposed liability on the defendant under the same "direct hydrologic connection" rationale as in *Kinder Morgan*. *Tenn. Clean Water Network v. TVA*, 273 F. Supp. 3d 775 (M.D. Tenn. 2017). The court also ordered the defendant to "fully excavate" the coal ash and relocate it to a lined disposal facility. *Id*.

On appeal, the Sixth Circuit reversed:

As the district court rightly concluded, "an unlined [coal] ash waste pond in karst terrain immediately adjacent to a river" that leaks pollutants into groundwater is a major environmental problem that the [defendant's NPDES permit] does not adequately address. But the CWA is not the proper legal tool of correction. Fortunately, other environmental laws have been enacted to remedy these concerns. For these reasons, as well as those articulated in [Kentucky Utilities], we REVERSE the judgment of the district court imposing CWA liability on TVA.

2018 U.S. App. LEXIS 27237, at *16.

In reaching this conclusion, the Sixth Circuit rejected the "direct hydrological connection" rationale, ruling that it was inconsistent with the plain language of the statute and in direct conflict with the Resource Conservation and Recovery Act ("RCRA") (pursuant to which EPA has adopted rules specifically governing coal ash storage and treatment).

Judge Clay wrote a separate dissenting opinion in which he argued that "[t]he majority is way off the rails" by adding a "directness requirement" to the definition of "discharge of pollutants." He "would join [the Fourth and Ninth Circuits] in holding that the CWA prohibits all pollution that reaches navigable waters 'by means of groundwater with a direct hydrological connection to such navigable waters[.]" 2018 U.S. App. LEXIS 27237, at *34 (quoting *Upstate Forever v. Kinder Morgan Energy Partners, LP*, 887 F.3d 637, 652 (4th Cir. 2018)).

d. Kentucky Waterways Alliance v. Kentucky Utilities Co., No. 18-5115, 2018 U.S. App. LEXIS 27238 (6th Cir. Sept. 24, 2018)

Kentucky Utilities is substantially similar to TVA for purposes of this paper. The only difference is that it was originally decided in favor of defendant at the motion to dismiss stage. It also included RCRA claims that the Sixth Circuit revived on appeal and will now need to be considered by the district court on remand for further proceedings. Judge Clay wrote an identical dissent, concurring only in the majority's RCRA ruling.

e. Sierra Club v. Virginia Electric & Power Co., 2018 U.S. App. LEXIS 25831 (4th Cir. Sept. 12, 2018)

Although *VEPCO* shares the same basic fact pattern as *TVA* and *Kentucky Utilities*, it was decided on altogether different grounds. Bound by its earlier decision in *Kinder Morgan*, the Fourth Circuit first applied the "direct hydrological connection" rationale, noting that there was no factual dispute on appeal as to whether "arsenic from the coal ash was seeping 'directly into the groundwater and, from there, directly into the surface water." 2018 U.S. App. LEXIS 25831, at *13 (citation omitted). But the court then proceeded to analyze whether the coal ash ponds and landfill at issue in the case constituted a "point source."

After trial, the district court ruled that the ponds and landfill were point sources because they allowed precipitation to percolate through them to the groundwater, which then carried arsenic to

navigable waters. 247 F. Supp. 3d 753 (E.D. Va. 2017). On appeal, the Fourth Circuit rejected the district court's logic, finding that this kind of "simple causal link does not fulfill the [CWA's] requirement that the discharge be *from a point source*."

By its carefully defined terms, the [CWA] limits its regulation under § 1311(a) to discharges from "any *discernible*, *confined and discrete conveyance*" At its core, the Act's definition makes clear that some facility must be involved that functions as a discrete, not generalized, "conveyance."

Id. at *16 (emphasis in original) (quoting Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976)). According to the court, "[i]n this context, the landfill and ponds were not created to convey anything and did not function in that manner; they certainly were not discrete conveyances, such as would be a pipe or channel, for example." Id. at *17. Instead, "they were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them" and thus, not "point sources." Id. at *18.

In reaching this holding, the Fourth Circuit looked to the "larger scheme of pollution regulation enacted by Congress," noting that Congress "clearly intended to target the *measurable* discharge of pollutants" through the effluent limits scheme in the NPDES permit program, which applies "precise, numeric [limits] to discrete outfalls and other 'point sources' . . . as opposed to 'indeterminate and dispersed percolation.'" *Id.* at *18-19. The court went on to confirm that this did not mean such pollution "slip[ped] through the regulatory cracks. To the contrary, EPA classifies coal ash . . . as nonhazardous waste governed by the RCRA and has issued regulations pursuant to the RCRA imposing specific guidelines for the construction, management, and ultimate closure of coal ash sites, including, notably, obligations to monitor groundwater quality and undertake any necessary corrective action." *Id.* at *19-20 (citations omitted).

Shortly after the Fourth Circuit's decision, the plaintiff filed for rehearing or rehearing *en banc*. The court has not yet ruled on this petition.

Potential Pathways to Resolution

The pending petitions for cert in *Maui* and *Kinder Morgan*, coupled with the recent conflicting decisions in *TVA* and *Kentucky Utilities*, make it increasingly likely that the "direct hydrological connection" rationale for liability under the CWA will end up before the Supreme Court for ultimate resolution.

However, since *VEPCO* was decided on other, more fundamental grounds, it may prove to be a more telling bellwether for future CWA litigation. In short, as long as the "direct hydrological connection" issue remains in flux, litigants would be wise to position their cases, not just on the existence (or absence) of such a connection, but also on the existence (or absence) of some sort of "conveyance" that was found to be lacking in *VEPCO*. There is no obvious split in the circuits on this particular issue, making it less likely to be a near-term candidate for Supreme Court review.

Separately, EPA just recently completed a public comment process on the "direct hydrological connection" rationale with an eye toward repudiating its prior statements and position. *See* 83 Fed. Reg. 7,126 (Feb. 20, 2018). Time will tell if EPA actually does so, whether through policy, guidance or rulemaking. Even if it does, the recent cases beg the question of whether there is any room for an EPA regulatory interpretation. In short, if Congress was clear, that is the end of the matter.

And of course, Congress could play a role here, as well, through further clarifying legislation of one sort or another. The outcome of the midterm elections will likely dictate whether this is in the realm of possibility.

Message

From: Bulleit, Kristy [kbulleit@hunton.com]

Sent: 9/7/2018 3:46:53 PM

To: Fleischli, Steve [sfleischli@nrdc.org]; Smith, Brooks M. [Brooks.Smith@troutmansanders.com]

CC: Ross, David P [ross.davidp@epa.gov]; Lieberman, Paige [Lieberman.Paige@epa.gov]; Steinbauer, Gary

(GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]; Bulleit, Kristy [kbulleit@hunton.com]

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues

for SEER Fall Meeting CWA Panel

Let me think about a couple of questions for your consideration.

Kristy Bulleit Partner kbulleit@HuntonAK.com p 202.955.1547 bio | vCard

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----Original Message----

From: Fleischli, Steve [mailto:sfleischli@nrdc.org]

Sent: Friday, September 07, 2018 11:18 AM To: Bulleit, Kristy; Smith, Brooks M.

Cc: David Ross (ross.davidp@epa.gov); Lieberman, Paige; Steinbauer, Gary (GSteinbauer@babstcalland.com) Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

As luck would have it, I am an attorney on the LA Waterkeeper RDA case, so happy to have that thrown in the mix (although I am not yet sure how to wedge it in with the other topics).

----Original Message----

From: Bulleit, Kristy <kbulleit@hunton.com> Sent: Friday, September 7, 2018 7:51 AM

To: Smith, Brooks M. <Brooks.Smith@troutmansanders.com>

Cc: Fleischli, Steve <sfleischli@nrdc.org>; David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; Lieberman, Paige <Lieberman.Paige@epa.gov>; Steinbauer, Gary (GSteinbauer@babstcalland.com)

<GSteinbauer@babstcalland.com>; Bulleit, Kristy <kbulleit@hunton.com>

Subject: Re: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Thanks, Brooks. The WA thermal standard case would make an interesting discussion (both as to the original procedural question regarding the State's interpretation of the criteria and the subsequent TMDL

litigation) as would a case Gary suggested (the LA Riverkeeper RDA decision). Now we have to figure out how to wedge them in and tee them up. I welcome suggestions for reallocating time.

[Hunton Andrews Kurth]

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On Sep 7, 2018, at 7:01 AM, Smith, Brooks M. <Brooks.Smith@troutmansanders.com</br>

Apologies for the delay. I think the outline and format look good. I am planning to focus my paper on the direct hydro connection issue.

On WQS/TMDL, there is an interesting case that EPA is defending in the Pacific Northwest, the latest in a line of cases targeting EPA's approval of temperature criteria and TMDLs. In the immediately preceding case, the court vacated EPA's approval of certain aspects of the criteria that dealt with background conditions. The plaintiffs then challenged the TMDLs that were established using those criteria, essentially claiming they were the fruit of the poisoned tree. The court agreed and we are now in the remedy phase (argument is next Tuesday in D. Or.). The question is whether the TMDLs should be vacated outright or whether they should remain in place. Our argument, in support of EPA, is that they remain useful and directionally correct and help to provide a blueprint for on-the-ground restoration activities. Not sure where this will go but it begs interesting questions about the interplay between WQSs and TMDLs, especially since modern TMDLs do far more than simply provide a calculation of LA + WLA + MOS = total cap.

When I spoke to Gary the other day, I suggested that we may also want to present a few Q&As on 401 water quality certifications. These have obviously become a big and controversial deal in interstate natural gas pipeline proceedings in multiple federal circuits, and I understand will also be a renewed area of focus for Congress. Happy to help frame some questions if others agree.

Best, Brooks

Brooks M. Smith troutman sanders Direct: 804.697.1414 brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>

From: Bulleit, Kristy <kbulleit@hunton.com<mailto:kbulleit@hunton.com>>
Sent: Wednesday, September 5, 2018 2:35 PM
To: Fleischli, Steve <sfleischli@nrdc.org<mailto:sfleischli@nrdc.org>>; David Ross
(ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>) <ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>>;
'Lieberman, Paige' <Lieberman.Paige@epa.gov<mailto:Lieberman.Paige@epa.gov>>; Smith, Brooks M.
<Brooks.Smith@troutmansanders.com<mailto:Brooks.Smith@troutmansanders.com>>

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>)
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<kbulleit@hunton.com<mailto:kbulleit@hunton.com>>
Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via
Groundwater issues for SEER Fall Meeting CWA Panel

Thanks for you helpful comments, Steve. Brooks and Dave, I'd be grateful if you'd weigh in on Steve's suggestion to combine WOTUS questions 2 and 3, and if you agree, let me know whether you'd prefer to allot that time to WOTUS question 4 or put the time into the TMDL/WQS issues. Also, let me know how you'd like to approach the TMDL/WQS issues, both in terms of specific questions and type/order of presentation.

<image001.jpg>
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From: Fleischli, Steve [mailto:sfleischli@nrdc.org]
Sent: Tuesday, September 04, 2018 6:08 PM
To: Bulleit, Kristy; David Ross (ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>); 'Lieberman, Paige'; 'brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>'
Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>)
Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Thanks for the prompt, Kristy. This approach generally seems fine with me. Responses to Question 3 could overlap with what is said in response to Question 2. It is good to call out the specific case law for this audience, but perhaps combining those two questions could give space for a TMDL/WQS question relating to WOTUS. On the DGW question to me, I made some edits for clarity (in yellow) since the sentence otherwise seemed incomplete.

Sincerely,

From: Bulleit, Kristy <kbulleit@hunton.com<mailto:kbulleit@hunton.com>> Sent: Tuesday, September 4, 2018 10:04 AM
To: David Ross (ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>)
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Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via
Groundwater issues for SEER Fall Meeting CWA Panel

Hello, all. I'm just checking in because I have received zero input on this proposal, so first and foremost I wanted to make sure you all received it. I suspect that some of you, like Steve, were on vacation. In any case, please take a look as soon as possible and share your views.

Also, just a gentle reminder that I look forward to receiving your draft written materials on Sept. 14th.

Best, Kristy

From: Bulleit, Kristy

Sent: Monday, August 27, 2018 4:28 PM

To: David Ross (ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>); Lieberman, Paige;

brooks.smith@troutman.com<, Fleischli, Steve

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>); Bulleit, Kristy Subject: Important - For your review and input **Proposed questions on WOTUS and Discharge via

Groundwater issues for SEER Fall Meeting CWA Panel

Importance: High

As promised, I've been working on a list of possible questions we could use to guide our discussion on Oct. 19th Here are some suggestions for questions we might use to frame the presentations on WOTUS and discharge to groundwater issues. I'm still working on the TMDL/WQS questions, but I will send those once the group has addressed the question I pose below.

Please take a look at let me know what you think. If you would like to reframe the questions, delete or add questions, or simply prefer to consider a different approach, that's fine — all ideas are welcome. This is a just a starting point to get us thinking. I've also taken the liberty of attempting to allocate our time among the topics and speakers. Please weigh in on these allocations as well.

Please note: As you'll see, I've taken different organizational approaches to the questions on WOTUS and DGW. For WOTUS, once the background is out of the way, I've come up with a short list of questions that each panelist would be invited to address. I struggled to come up with a list short enough to allow for meaningful answers. If you'd like to see my (really long) list, let me know and I'll circulate it. If you'd prefer to use an approach that looks more like that proposed approach for DGW, let me know. Conversely, if you'd prefer to change the DGW organizational approach, let me know that too.

Because the schedule calls for you to send your draft papers to me by September 14, there is no need for you to use these questions as a template for your papers. That said, to the extent you choose use some of questions as a point of reference, feel free.

As you can see, fitting all three topics included in course description into an hour and a half will be a challenge. That said, I am mindful of the need to cover the topics advertised. I wonder whether it might make sense to try to weave the TMDL issue into the presentations on the WOTUS and DGW issues, instead of attempting a free-standing discussion of TMDL developments. Here is my thought. It seems to me that WQS/TMDL issues are relevant to the ongoing debates on both WOTUS and DGW. Because states (and EPA, if states fail to act) must set WQS for all WOTUS, there are a range of issues that arise when waters less traditionally classified as "waters" or WOTUS are deemed jurisdictional. We could add to or modify the questions to inquire about how the WOTUS issue affects the establishment of WQS, establishment of TMDLs for those waters, or achievement of WQS or implementation of TMDLs for downstream waters. Similarly, for the DGW issue, many have argued that discharges via groundwater are nonpoint sources, and the Chesapeake Bay TMDLs demonstrates that the TMDLs program can be used to ensure that nonpoint sources that cause or contribute to WQS violations will be addressed. We could modify or add a question about how the ultimate resolution of the DGW issue, through rulemaking or Supreme Court review, affects the TMDLs program. If we choose to present the TMDL topic separately, we'll have to take time out of that allotted for answers to the questions posed below.

I'd be grateful if all of you (including you, Gary) would weigh in on this approach.

Paige and Dave: I suspect that, no matter what we decide, the WOTUS and discharge to groundwater issues will eat up a great deal of our time. For that reason, if EPA's paper could cover the state of play on regional WQS and TMDL issues (such as implementation of the Chesapeake Bay TMDL, any developments on other regional or high profile watershed TMDL issues), that would be really great.

Oct. 19, 10:30-noon

Bring session to order, brief overview and section announcements, introduction of speakers (10 minutes max)

Topic 1: WOTUS (35 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (5 minutes max)

Question 1 (for Dave Ross): [NOTE: the specific phrasing of this question will depend on what proposals or other actions EPA has put forth as of the date of the conference. As placeholder, I've included a general question] Dave, can you give us a brief overview of where EPA stands in its effort to propose a replacement rule, and what key issues it is targeting? (5 minutes)

Question 2: What, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? (10 minutes total) (proposed order: Steve, Brooks, Dave). (10 minutes total)

Question 3: How should the Supreme Court's decisions in Riverside Bayview, SWANCC, and Rapanos (plurality and concurrence) inform any rule? (proposed order: Brooks, Steve, Dave). (10 minutes total)

Bonus:

Question 4: If EPA ultimately chooses to draw the line more narrowly than the Obama Administration did, or than the 1986/1988 iterations did, what in your view will be the consequences for CWA implementation? (proposed order: Brooks, Steve). {We don't time for this, but I thought I'd throw it in anyway, for purposes of eliciting discussion.) (5 minutes total)

Topic 2: Discharge to surface water via hydrologically connected groundwater (30 minutes of presentation, 10 minutes of questions or discussion among panelists)

Kristy: 1-2 minute set up

Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? 10 minutes)

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean Water Act permitting requirements, although the specific tests applied by the courts differ. We'd be interested to hear your views on the practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes?) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received __ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score). (10 minutes)

Topic 3: TMDLs and related WQS issues (based on allocation above, this would have to be 10 minutes or less, unless we reallocate/shorten times above

<image002.jpg>

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3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAngDqVYUC 3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=JyOSW2HJyEzV8ztHDkNMz1SL_OsT1O3183jzZa4662g&e=>

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From: Bulleit, Kristy [kbulleit@hunton.com]

9/12/2018 1:17:44 PM Sent:

Smith, Brooks M. [Brooks.Smith@troutmansanders.com] To:

CC: Fleischli, Steve [sfleischli@nrdc.org]; Ross, David P [ross.davidp@epa.gov]; Lieberman, Paige

[Lieberman.Paige@epa.gov]; Steinbauer, Gary (GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]

Re: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues Subject:

for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt; image002.jpg

Thanks Brooks. I'll Look at the decision and consider what this suggests about the appropriate distribution of time for the panel discussion.

[Hunton Andrews Kurth]

Kristy Bulleit

Partner

kbulleit@HuntonAK.com<mailto:kbulleit@HuntonAK.com>

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Also, just a gentle reminder that I look forward to receiving your draft written materials on Sept. 14th.

Best, Kristy

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Importance: High

As promised, I've been working on a list of possible questions we could use to guide our discussion on Oct. 19th Here are some suggestions for questions we might use to frame the presentations on WOTUS and discharge to groundwater issues. I'm still working on the TMDL/WQS questions, but I will send those once the group has addressed the question I pose below.

Please take a look at let me know what you think. If you would like to reframe the questions, delete or add questions, or simply prefer to consider a different approach, that's fine — all ideas are welcome. This is a just a starting point to get us thinking. I've also taken the liberty of attempting to allocate our time among the topics and speakers. Please weigh in on these allocations as well.

Please note: As you'll see, I've taken different organizational approaches to the questions on WOTUS and DGW. For WOTUS, once the background is out of the way, I've come up with a short list of questions that

each panelist would be invited to address. I struggled to come up with a list short enough to allow for meaningful answers. If you'd like to see my (really long) list, let me know and I'll circulate it. If you'd prefer to use an approach that looks more like that proposed approach for DGW, let me know. Conversely, if you'd prefer to change the DGW organizational approach, let me know that too.

Because the schedule calls for you to send your draft papers to me by September 14, there is no need for you to use these questions as a template for your papers. That said, to the extent you choose use some of questions as a point of reference, feel free.

As you can see, fitting all three topics included in course description into an hour and a half will be a challenge. That said, I am mindful of the need to cover the topics advertised. I wonder whether it might make sense to try to weave the TMDL issue into the presentations on the WOTUS and DGW issues, instead of attempting a free-standing discussion of TMDL developments. Here is my thought. It seems to me that WQS/TMDL issues are relevant to the ongoing debates on both WOTUS and DGW. Because states (and EPA, if states fail to act) must set WQS for all WOTUS, there are a range of issues that arise when waters less traditionally classified as "waters" or WOTUS are deemed jurisdictional. We could add to or modify the questions to inquire about how the WOTUS issue affects the establishment of WQS, establishment of TMDLs for those waters, or achievement of WQS or implementation of TMDLs for downstream waters. Similarly, for the DGW issue, many have argued that discharges via groundwater are nonpoint sources, and the Chesapeake Bay TMDLs demonstrates that the TMDLs program can be used to ensure that nonpoint sources that cause or contribute to WQS violations will be addressed. We could modify or add a question about how the ultimate resolution of the DGW issue, through rulemaking or Supreme Court review, affects the TMDLs program. If we choose to present the TMDL topic separately, we'll have to take time out of that allotted for answers to the questions posed below.

I'd be grateful if all of you (including you, Gary) would weigh in on this approach.

Paige and Dave: I suspect that, no matter what we decide, the WOTUS and discharge to groundwater issues will eat up a great deal of our time. For that reason, if EPA's paper could cover the state of play on regional WQS and TMDL issues (such as implementation of the Chesapeake Bay TMDL, any developments on other regional or high profile watershed TMDL issues), that would be really great.

Oct. 19, 10:30-noon

Bring session to order, brief overview and section announcements, introduction of speakers (10 minutes max)

Topic 1: WOTUS (35 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (5 minutes max)

Question 1 (for Dave Ross): [NOTE: the specific phrasing of this question will depend on what proposals or other actions EPA has put forth as of the date of the conference. As placeholder, I've included a general question] Dave, can you give us a brief overview of where EPA stands in its effort to propose a replacement rule, and what key issues it is targeting? (5 minutes)

Question 2: What, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? (10 minutes total) (proposed order: Steve, Brooks, Dave). (10 minutes total)

Question 3: How should the Supreme Court's decisions in Riverside Bayview, SWANCC, and Rapanos (plurality and concurrence) inform any rule? (proposed order: Brooks, Steve, Dave). (10 minutes total)

Bonus

Question 4: If EPA ultimately chooses to draw the line more narrowly than the Obama Administration did, or than the 1986/1988 iterations did, what in your view will be the consequences for CWA implementation? (proposed order: Brooks, Steve). {We don't time for this, but I thought I'd throw it in anyway, for purposes of eliciting discussion.) (5 minutes total)

Topic 2: Discharge to surface water via hydrologically connected groundwater (30 minutes of presentation, 10 minutes of questions or discussion among panelists)

Kristy: 1-2 minute set up

Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? 10 minutes)

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean

Water Act permitting requirements, although the specific tests applied by the courts differ. We'd be interested to hear your views on the practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes?) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received __ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score). (10 minutes)

Topic 3: TMDLs and related WQS issues (based on allocation above, this would have to be 10 minutes or less, unless we reallocate/shorten times above

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As promised, I've been working on a list of possible questions we could use to guide our discussion on Oct. 19th Here are some suggestions for questions we might use to frame the presentations on WOTUS and discharge to groundwater issues. I'm still working on the TMDL/WQS questions, but I will send those once the group has addressed the question I pose below.

Please take a look at let me know what you think. If you would like to reframe the questions, delete or add questions, or simply prefer to consider a different approach, that's fine – all ideas are welcome. This is a just a starting point to get us thinking. I've also taken the liberty of attempting to allocate our time among the topics and speakers. Please weigh in on these allocations as well.

Please note: As you'll see, I've taken different organizational approaches to the questions on WOTUS and DGW. For WOTUS, once the background is out of the way, I've come up with a short list of questions that each panelist would be invited to address. I struggled to come up with a list short enough to allow for meaningful answers. If you'd like to see my (really long) list, let me know and I'll circulate it. If you'd prefer to use an approach that looks more like that proposed approach for DGW, let me know. Conversely, if you'd prefer to change the DGW organizational approach, let me know that too.

Because the schedule calls for you to send your draft papers to me by **September 14**, there is no need for you to use these questions as a template for your papers. That said, to the extent you choose use some of questions as a point of reference, feel free.

As you can see, fitting all three topics included in course description into an hour and a half will be a challenge. That said, I am mindful of the need to cover the topics advertised. I wonder whether it might make sense to try to weave the TMDL issue into the presentations on the WOTUS and DGW issues, instead of attempting a free-standing discussion of TMDL developments. Here is my thought. It seems to me that WQS/TMDL issues are relevant to the ongoing debates on both WOTUS and DGW. Because states (and EPA, if states fail to act) must set WQS for all WOTUS, there are a range of issues that arise when waters less traditionally classified as "waters" or WOTUS are deemed jurisdictional. We could add to or modify the questions to inquire about how the WOTUS issue affects the establishment of WQS, establishment of TMDLs for those waters, or achievement of WQS or implementation of TMDLs for downstream waters. Similarly, for the DGW issue, many have argued that discharges via groundwater are nonpoint sources, and the Chesapeake Bay TMDLs demonstrates that the TMDLs program can be used to ensure that nonpoint sources that cause or contribute to WQS violations will be addressed. We could modify or add a question about how the ultimate resolution of the DGW issue, through rulemaking or Supreme Court review, affects the TMDLs program. If we choose to present the TMDL topic separately, we'll have to take time out of that allotted for answers to the questions posed below.

I'd be grateful if all of you (including you, Gary) would weigh in on this approach.

Paige and Dave: I suspect that, no matter what we decide, the WOTUS and discharge to groundwater issues will eat up a great deal of our time. For that reason, if EPA's paper could cover the state of play on regional WQS and TMDL issues (such as implementation of the Chesapeake Bay TMDL, any developments on other regional or high profile watershed TMDL issues), that would be really great.

Oct. 19, 10:30-noon

Bring session to order, brief overview and section announcements, introduction of speakers (10 minutes max)

Topic 1: WOTUS (35 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (5 minutes max)

Question 1 (**for Dave Ross**): [NOTE: the specific phrasing of this question will depend on what proposals or other actions EPA has put forth as of the date of the conference. As placeholder, I've included a general question] Dave, can you give us a brief overview of where EPA stands in its effort to propose a replacement rule, and what key issues it is targeting? (5 minutes)

Question 2: What, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? (10 minutes total) (proposed order: Steve, Brooks, Dave). (10 minutes total)

Question 3: How should the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* (plurality and concurrence) inform any rule? (proposed order: Brooks, Steve, Dave). (10 minutes total)

Bonus:

Question 4: If EPA ultimately chooses to draw the line more narrowly than the Obama Administration did, or than the 1986/1988 iterations did, what in your view will be the consequences for CWA implementation? (proposed order: Brooks, Steve). (We don't time for this, but I thought I'd throw it in anyway, for purposes of eliciting discussion.) (5 minutes total)

Topic 2: Discharge to surface water via hydrologically connected groundwater (30 minutes of presentation, 10 minutes of questions or discussion among panelists)

Kristy: 1-2 minute set up

Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? 10 minutes)

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean Water Act permitting requirements, although the specific tests applied by the courts differ. We'd be interested to hear your views on the practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes?) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received ___ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score). (10 minutes)

Topic 3: TMDLs and related WQS issues (based on allocation above, this would have to be 10 minutes or less, unless we reallocate/shorten times above



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Appeal: 17-1895

Doc: 96

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 17-1895

SIERRA CLUB,

Plaintiff - Appellee,

V.

VIRGINIA ELECTRIC & POWER COMPANY, f/k/a Dominion Virginia Power, d/b/a Dominion Energy Virginia,

Defendant - Appellant,

and

VIRGINIA CHAMBER OF COMMERCE, VIRGINIA MANUFACTURERS ASSOCIATION, EDISON ELECTRIC INSTITUTE, UTILITY WATER ACT GROUP, AND UTILITY SOLID WASTE ACTIVITIES GROUP,

Amici Supporting Appellant,

WATERKEEPER ALLIANCE, INCORPORATED; CAPE FEAR RIVER WATCH; CATAWBA RIVERKEEPER FOUNDATION; COASTAL CAROLINA RIVER WATCH; CONGAREE RIVERKEEPER, INC.; EDISTO RIVERKEEPER; HAW RIVER ASSEMBLY; MIDSHORE RIVERKEEPER CONSERVANCY, INC.; MOUNTAINTRUE; POTOMAC RIVERKEEPER NETWORK, INC.; SASSAFRAS RIVER ASSOCIATION, INC.; SOUND RIVERS, INC.; VIRGINIA EASTERN SHOREKEEPER, INC.; WEST VIRGINIA RIVERS COALITION; WINYAH RIVERS FOUNDATION, INC.; YADKIN RIVERKEEPER, INC.; CITY OF CHESAPEAKE,

Amici Supporting Appellee) .
N	o. 17-1952

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SIERRA CLUB,

Plaintiff - Appellant,

v.

VIRGINIA ELECTRIC & POWER COMPANY, f/k/a Dominion Virginia Power, d/b/a Dominion Energy Virginia,

Defendant - Appellee.

.

VIRGINIA CHAMBER OF COMMERCE; VIRGINIA MANUFACTURERS ASSOCIATION; EDISON ELECTRIC INSTITUTE; UTILITY WATER ACT GROUP; UTILITY SOLID WASTE ACTIVITIES GROUP,

Amici Supporting Appellee,

WATERKEEPER ALLIANCE, INCORPORATED; CAPE FEAR RIVER WATCH; CATAWBA RIVERKEEPER FOUNDATION; COASTAL CAROLINA RIVER WATCH; CONGAREE RIVERKEEPER, INC.; EDISTO RIVERKEEPER; HAW RIVER ASSEMBLY; MIDSHORE RIVERKEEPER CONSERVANCY, INC.; MOUNTAINTRUE; POTOMAC RIVERKEEPER NETWORK, INC.; SASSAFRAS RIVER ASSOCIATION, INC.; SOUND RIVERS, INC.; VIRGINIA EASTERN SHOREKEEPER, INC.; WEST VIRGINIA RIVERS COALITION; WINYAH RIVERS FOUNDATION, INC.; YADKIN RIVERKEEPER, INC.; CITY OF CHESAPEAKE,

Amici Supporting Appellant.	
Appeals from the United States District Court Norfolk. John A. Gibney, Jr., District Judge. (2:1	
Argued: March 21, 2018	Decided: September 12, 2018
Before NIEMEYER and THACKER, Circuit Judge.	udges, and TRAXLER, Senior Circuit

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Affirmed in part and reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Thacker and Senior Judge Traxler joined.

ARGUED: Jeffrey A. Lamken, MOLOLAMKE

ARGUED: Jeffrey A. Lamken, MOLOLAMKEN LLP, Washington, D.C., for Appellant/Cross-Appellee. Frank S. Holleman, III, SOUTHERN ENVIRONMENTAL LAW CENTER, Chapel Hill, North Carolina, for Appellee/Cross-Appellant. Brooks M. Smith, Dabney J. Carr, IV, TROUTMAN SANDERS LLP, Richmond, Virginia; Robert K. Kry, James A. Barta, Washington, D.C., Ekta R. Dharia, MOLOLAMKEN LLP, New York, New York, for Appellant/Cross-Appellee. Deborah M. Murray, Nathaniel H. Benforado, Charlottesville, Virginia, Christopher J. Bowers, ENVIRONMENTAL **SOUTHERN** LAW CENTER, Atlanta, Georgia, Appellee/Cross-Appellant. Kristy A.N. Bulleit, Washington, D.C., Michael R. Shebelskie, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, for Amici Virginia Chamber of Commerce, Virginia Manufacturers Association, Edison Electric Institute, and Utility Water Act Group. Douglas H. Green, John F. Cooney, Margaret K. Fawal, VENABLE LLP, Washington, D.C., for Amicus Utility Solid Waste Activities Group. Reed W. Super, Nicholas W. Tapert, SUPER LAW GROUP, LLC, New York, New York, for Amici Waterkeeper Alliance, Inc., Cape Fear River Watch, Inc., Catawba Riverkeeping Foundation, Inc., Coastal Carolina River Watch, Congaree Riverkeeper, Inc., Edisto Riverkeeper, Haw River Assembly, Midshore Riverkeeper Conservancy, Inc., MountainTrue, Potomac Riverkeeper Network, Inc., Sassafras River Association, Inc., Sound Rivers, Inc., Virginia Eastern Shorekeeper, Inc., West Virginia Rivers Coalition, Winyah Rivers Foundation, Inc., and Yadkin Riverkeeper, Inc. Jan L. Proctor, City Attorney, Ellen F. Bergren, Assistant City Attorney, Ryan C. Samuel, Assistant City Attorney, OFFICE OF THE CITY ATTORNEY, Chesapeake, Virginia, for Amicus City of Chesapeake.

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NIEMEYER, Circuit Judge:

For over 60 years, Virginia Electric & Power Company, d/b/a Dominion Energy Virginia ("Dominion"), operated a coal-fired power plant in Chesapeake, Virginia, that produced coal ash as a by-product of the coal combustion. Pursuant to permits issued by the Virginia Department of Environmental Quality ("VDEQ") under the Clean Water Act and the Resource Conservation and Recovery Act, Dominion stored the coal ash on site in a landfill and in settling ponds.

Through groundwater monitoring that was required by the VDEQ permits, Dominion began in 2002 to detect arsenic in the groundwater at levels that exceeded Virginia's groundwater quality standards. Arsenic leaches from coal ash when water passes through it. As required, Dominion notified the VDEQ and began developing and implementing a corrective action plan with the VDEQ to mitigate the pollution. The VDEQ approved the plan in 2008. In 2014, Dominion closed its Chesapeake plant and began making arrangements with the VDEQ to close the landfill and settling ponds.

In March 2015, Sierra Club commenced this action against Dominion under the citizen-suit provision of the Clean Water Act, alleging that Dominion was violating 33 U.S.C. § 1311(a), which prohibits the unauthorized "discharge of any pollutant" into navigable waters. Under the Act, the discharge of a pollutant is defined to mean the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). According to Sierra Club's complaint, the landfill and settling ponds qualified as point sources from which arsenic seeped, polluting the groundwater around Dominion's plant and ultimately the navigable waters of the nearby Elizabeth River and Deep Creek.

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Based on these same allegations, Sierra Club also claimed that Dominion was violating two conditions of its Clean Water Act discharge permit.

Following a bench trial, the district court found that rainwater and groundwater were indeed leaching arsenic from the coal ash in the landfill and settling ponds, polluting the groundwater, which carried the arsenic into navigable waters. And because the court determined that the landfill and settling ponds constituted "point sources" as defined by the Act, it found Dominion liable for ongoing violations of § 1311(a). The court, however, deferred to the VDEQ's understanding that the two conditions in Dominion's discharge permit identified in Sierra Club's complaint did not cover the groundwater contamination at issue and ruled against Sierra Club on the claims alleging breach of those conditions. Dominion appealed, and Sierra Club cross-appealed.

Because we conclude that the landfill and settling ponds on the Chesapeake site do not constitute "point sources" as that term is defined in the Clean Water Act, we reverse the district court's ruling that Dominion was liable under § 1311(a) of the Act. We agree, however, with the district court's conclusion that the conditions in Dominion's discharge permit did not regulate the groundwater contamination at issue and affirm on those claims.

I

The Clean Water Act was enacted in 1972 with the stated objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To those ends, the Act prohibits the "discharge of any pollutant by any

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person" into navigable waters unless otherwise authorized by the Act. *Id.* § 1311(a). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). And "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14). Accordingly, the addition of pollutants to navigable waters from *nonpoint sources* does not violate § 1311(a). *See Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) ("Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [Clean Water] Act to regulate only the former").

As recognized in § 1311(a), the Act does provide for the issuance of permits authorizing the discharge of pollutants into navigable waters in compliance with specified effluent standards. In 50 U.S.C. § 1342(a), the Act established the National Pollutant Discharge Elimination System, under which the EPA may "issue a permit for the discharge of any pollutant" provided that the authorized discharge complies with the effluent standards specified in the permit or otherwise imposed by the Act. Through that System, the EPA also shares regulatory authority with the States, and a State can elect to establish its own permit program, subject to the EPA's approval. *Id.* § 1342(b)–(c); *see EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205–08 (1976). When a State elects to establish its own program, the EPA suspends its federal permit program and defers to the State's, allowing the state discharge permit to authorize effluent discharges under both state and federal law.

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While § 1311(a)'s prohibitive scope is limited to the discharge of pollutants from point sources, pollution from the storage of solid waste, such as coal ash, is regulated by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et. seq. The RCRA "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996). The Act distinguishes between hazardous and nonhazardous solid waste, and although hazardous waste facilities are subject to direct federal oversight, the nonhazardous waste facilities, such as those created to store coal ash, remain "primarily the function of State, regional, and local agencies" with the "financial and technical assistance and leadership" of federal authorities. 42 U.S.C. § 6901(a)(4). Nonetheless, the EPA has specifically promulgated "minimum national criteria" governing the design, management, and closure of facilities storing coal combustion residuals like coal ash. See 40 C.F.R. §§ 257.50–257.107. These facilities are required to obtain a permit either directly from the EPA or from an EPA-approved state program that mandates compliance with the minimum national criteria, as well as any other conditions imposed by the issuing state agency. 42 U.S.C. § 6945(d).

Virginia has elected to implement permitting programs under both the Clean Water Act and the RCRA. The VDEQ administers an EPA-approved program under the Clean Water Act for the issuance of permits covering the "[d]ischarge into state waters [of] sewage, industrial wastes, other wastes, or any noxious or deleterious substances." Va. Code Ann. § 62.1-44.5. And it administers a program under the RCRA regulating the storage, treatment, and disposal of solid waste through its Waste Management Act,

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Va. Code Ann. § 10.1-1400 *et. seq.* Operators of landfills or other facilities for the storage or treatment of coal combustion residuals must obtain a permit from the VDEQ that incorporates existing EPA regulations, including the minimum national criteria for coal ash sites. *See* Va. Code Ann. § 10.1-1408.1; 9 Va. Admin. Code §§ 20-81-800, 20-81-810.

II

From 1953 until 2014, Dominion operated a coal-fired power plant at its Chesapeake site, which is situated on a peninsula surrounded by the Elizabeth River to the east, Deep Creek to the south, and a man-made cooling channel to the west — all navigable waters.

While in operation, the Chesapeake plant generated large amounts of coal ash that Dominion stored on site. Coal ash was pumped as part of a slurry into settling ponds, and once the ash settled, the water was discharged into the nearby navigable waters, as authorized by a discharge permit issued by the VDEQ. Also, pursuant to a RCRA solid-waste permit issued by the VDEQ, Dominion stored dry coal ash in a landfill on the Chesapeake site. As a condition of this permit, Dominion was required to monitor the groundwater on the peninsula, and thus Dominion installed a system of wells around the edge of the peninsula that it used to conduct groundwater tests. The results of those tests were routinely submitted to the VDEQ for review.

Beginning in 2002, Dominion's tests revealed that the level of arsenic in the groundwater on the peninsula exceeded state groundwater protection standards. As

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required by its RCRA solid-waste permit, Dominion developed and implemented a corrective plan that it submitted to the VDEQ for public comment and agency review. The VDEQ approved the plan in 2008, and it was incorporated into Dominion's RCRA solid-waste permit in 2011.

In 2014, Dominion ceased operations at the Chesapeake plant, and by October 2015, it finished depositing coal ash on the site. In early 2016, Dominion submitted a permanent landfill closure plan and post-closure care plan to the VDEQ to be incorporated into its RCRA solid-waste permit. Dominion also submitted a closure plan and post-closure care plan for its settling ponds to the VDEQ for inclusion in its Clean Water Act discharge permit.

Sierra Club commenced this action in March 2015 against Dominion under the Clean Water Act's citizen-suit provision, 33 U.S.C. § 1365. The complaint alleged three ongoing violations of the Act. *First*, in Count One, it claimed that the seepage of arsenic from the coal ash into the nearby Elizabeth River and Deep Creek was violating § 1311(a)'s general prohibition against the unauthorized discharge of a pollutant from a point source into navigable waters. It asserted in particular that the coal ash storage facilities were point sources and that arsenic leached from them into the groundwater, which was "hydrologically connected" to the Elizabeth River and Deep Creek, thereby carrying arsenic to navigable waters. *Second*, in Count Two, it claimed that based on the same allegations, Dominion was violating Condition II.R of its Clean Water Act discharge permit. *Finally*, in Count Three, it claimed, again based on the same factual allegations, that Dominion was violating Condition II.F of its discharge permit. For

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relief, Sierra Club requested comprehensive injunctive relief, as well as the assessment of civil penalties.

Following a bench trial, the district court found that Dominion was violating § 1311(a), as alleged in Count One, but that it was not violating the two conditions, as alleged in Counts Two and Three. The district court rejected Dominion's argument that § 1311(a) of the Clean Water Act did not cover the seepage of arsenic from coal ash into the groundwater, concluding that the Act did indeed cover discharges into groundwater that had a "direct hydrological connection" to navigable waters such that the pollutant would reach navigable waters through the groundwater. And it found as fact that arsenic was reaching the Elizabeth River, Deep Creek, and the cooling channel in that manner. The court also rejected Dominion's argument that the landfill and settling ponds were not point sources because they were not conveyances. It stated, "Dominion built the [coal ash] piles and ponds to concentrate coal ash, and its constituent pollutants, in one location," and that that "one location channels and conveys arsenic directly into the groundwater and thence into the surfacewaters." As to Counts Two and Three, however, the district court deferred to the VDEQ's determination that the discharge permit did not govern the seepage of pollutants into groundwater at the Chesapeake site. For relief, the court entered a limited injunction requiring Dominion to implement a plan in coordination with the VDEQ to address the pollution, and it declined to impose civil penalties.

From the district court's orders, Dominion filed this appeal challenging the court's conclusions (1) that the Clean Water Act regulates discharges into navigable waters

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through hydrologically connected groundwater and (2) that the coal ash piles and ponds constitute "point sources" under the Clean Water Act. Sierra Club cross-appealed, arguing that the district court wrongly deferred to the VDEQ's interpretation of the permit conditions contrary to the plain terms of those conditions. It also challenges the limited injunctive relief granted and the court's failure to award civil penalties.

Ш

Dominion contends first that the district court erred in concluding that the discharge of pollutants into groundwater that is hydrologically connected to navigable waters is regulated by the Clean Water Act, 33 U.S.C. §§ 1311(a), 1362(12) (prohibiting the "discharge of any pollutant" and defining discharge of a pollutant as the addition of a pollutant "to navigable waters from any point source"). It argues that § 1311(a) only regulates discharges directly into navigable waters, not discharges into groundwater that is connected to navigable waters.

That issue was recently addressed by us in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), where we held that the addition of a pollutant into navigable waters *via groundwater* can violate § 1311(a) if the plaintiff can show "a direct hydrological connection between [the] ground water and navigable waters." *Id.* at 651. In this case, the district court likewise concluded that "[t]he [Clean Water Act] regulates the discharge of arsenic into navigable surface waters through hydrologically connected groundwater," *i.e.*, "[w]here the facts show a direct hydrological connection between ground water and surface water." It then found as fact

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that the arsenic from the coal ash was seeping "directly into the groundwater and, from there, directly into the surface water."

As Dominion does not challenge the district court's factual findings on appeal, we apply *Upstate Forever* and thus reject Dominion's argument, affirming the district court on this point.

IV

Dominion also contends that the district court erred in concluding that the landfill and each of the settling ponds constituted a "point source," as required to find it liable under § 1311(a) of the Clean Water Act. Dominion argues that the landfill and settling ponds, rather than satisfying the statutory definition of "point source" as a "discernible, confined and discrete conveyance," 33 U.S.C. § 1362(14), are actually "stationary feature[s] of the landscape through which rainwater or groundwater can move diffusely," resulting in a type of discharge that the Clean Water Act does not regulate. It also notes that the regulation of this type of discharge is covered by the RCRA, which regulates the treatment and storage of solid waste like coal ash and its effects on surface waters and groundwaters.

In addressing the "point source" requirement of the Clean Water Act, the district court was satisfied that the landfill and ponds were point sources because the rainwater and groundwater seeped *through the coal ash*, leaching arsenic into groundwater and ultimately into navigable waters. Describing that process in detail, the court stated that "precipitation percolates through the soil to the groundwater," which "moves freely

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through the sediment" and then "discharges to [the] surface water." The court acknowledged, however, that it could not "determine how much groundwater reaches the surface waters, or how much arsenic goes from the [site] to the surrounding waters." It added that "[a]ll tests of the surface waters surrounding the [site] have been well below the water quality criteria for arsenic" and that there were no "human health or environmental concerns around the [site]." Explaining specifically how these "coal ash piles," as the court called them, were "point sources," the court stated:

In determining whether a conveyance is a point source, "the ultimate question is whether pollutants were discharged from discernible, confined and discrete conveyance[s] either by gravitational or nongravitational means." *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 599 (S.D. W. Va. 2013)

The Coal Ash Piles do precisely that. Dominion built the piles and ponds to concentrate coal ash, and its constituent pollutants, in one location. That one location channels and conveys arsenic directly into the groundwater and thence into the surface waters. Essentially, they are discrete mechanisms that convey pollutants from the old power plant to the river.

It stated in summary, "the Court finds that each of the Coal Ash Piles constitutes a point source because they are discrete conveyances of pollutants discharged into surface waters."

Put simply, therefore, the question presented is whether the landfill and settling ponds serve as "point sources" because they allow precipitation to percolate through them to the groundwater, which then carries arsenic to navigable waters.

We conclude that while arsenic from the coal ash stored on Dominion's site was found to have reached navigable waters — having been leached from the coal ash by rainwater and groundwater and ultimately carried by groundwater into navigable waters

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— that simple causal link does not fulfill the Clean Water Act's requirement that the discharge be *from a point source*. By its carefully defined terms, the Clean Water Act limits its regulation under § 1311(a) to discharges from "any *discernible*, *confined and discrete conveyance*." 33 U.S.C. § 1362(14) (emphasis added). The definition includes, "but [is] not limited to[,] any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Id.*; *see also Consol. Coal Co. v. Costle*, 604 F.2d 239, 249–50 (4th Cir. 1979), *rev'd in part sub nom. EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980) (finding that "discharges which are pumped, siphoned or drained" fall within the definition of discharges from a "point source"); *Appalachian Power*, 545 F.2d at 1373 (concluding that "point source" pollution does not include "unchanneled and uncollected surface waters"). At its core, the Act's definition makes clear that some facility must be involved that functions as a discrete, not generalized, "conveyance."

"Conveyance" is a well-understood term; it requires a channel or medium — *i.e.*, a facility — for the movement of something from one place to another. *See Webster's Third New International Dictionary* 499 (1961); *The American Heritage Dictionary of the English Language* 291–92 (1976); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) ("[A] point source need not be the original source of the pollutant; it need only *convey* the pollutant to 'navigable waters'" (emphasis added)). If no such *conveyance* produces the discharge at issue, the discharge would not be regulated by the Clean Water Act, though it might be by the RCRA, which covers and regulates the storage of solid waste, including coal ash, and its effect on groundwater.

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Here, the arsenic was found to have leached from static accumulations of coal ash on the initiative of rainwater or groundwater, thereby polluting the groundwater and ultimately navigable waters. In this context, the landfill and ponds were not created to convey anything and did not function in that manner; they certainly were not discrete conveyances, such as would be a pipe or channel, for example. Indeed, the actual means of conveyance of the arsenic was the rainwater and groundwater flowing *diffusely* through the soil. This diffuse seepage, moreover, was a generalized, site-wide condition that allowed rainwater to distribute the leached arsenic widely into the groundwater of the entire peninsula. Thus, the landfill and settling ponds could not be characterized as discrete "points," nor did they function as conveyances. Rather, they were, like the rest of the soil at the site, static recipients of the precipitation and groundwater that flowed through them. Accordingly, we conclude that the court erred in finding that the landfill and ponds were point sources as defined in the Clean Water Act.

This understanding of the Clean Water Act's point-source requirement is consistent with the larger scheme of pollution regulation enacted by Congress. In regulating discharges of pollutants from point sources, Congress clearly intended to target the *measurable* discharge of pollutants. Not only is this revealed by the definitional text of "point source," but it is also manifested in the effluent limitation enforcement scheme that the Clean Water Act employs. The National Pollutant Discharge Elimination System Program and § 1311's enforcement scheme specifically rely on "effluent limitation[s]" — restrictions on the "quantities, rates, and concentrations" of pollutants discharged into navigable waters. 33 U.S.C. § 1362(11) (defining "effluent limitation"). And state-

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federal permitting programs under the Clean Water Act apply these precise, numeric limitations to discrete outfalls and other "point sources," see California ex rel. Res. Control Bd., 426 U.S. at 205–08, at which compliance can be readily monitored. When a source works affirmatively to convey a pollutant, the concentration of the pollutant and the rate at which it is discharged by that conveyance can be measured. But when the alleged discharge is diffuse and not the product of a discrete conveyance, that task is virtually impossible. Tellingly, the district court in this case concluded candidly that it could not "determine how much groundwater reaches the surface waters, or how much arsenic goes from the [plant site] to the surrounding waters. It could be a few grams each day, or a much larger amount." Such indeterminate and dispersed percolation indicates the absence of any facility constituting a discernible, confined, and discrete conveyance. Moreover, it indicates circumstances that are incompatible with the effluent limitation scheme that lies at the heart of the Clean Water Act.

Of course, the fact that such pollution falls outside the scope of the Clean Water Act's regulation does not mean that it slips through the regulatory cracks. To the contrary, the EPA classifies coal ash and other coal combustion residuals as nonhazardous waste governed by the RCRA, see 40 C.F.R. §§ 257.50, 257.53, and it has issued regulations pursuant to the RCRA imposing specific guidelines for the construction, management, and ultimate closure of coal ash sites, including, notably, obligations to monitor groundwater quality and undertake any necessary corrective action, see 40 C.F.R. §§ 257.90–257.98. In 2016, Congress amended the RCRA specifically to require that operators of coal ash landfills, surface impoundments, and

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similar facilities obtain permits incorporating the EPA's regulations pertaining to the disposal of coal combustion residuals. *See* 42 U.S.C. § 6945(d). And Virginia operates just such a program. *See* Va. Code Ann. § 10.1-1408.1; 9 Va. Admin. Code §§ 20-81-800, 20-81-810.

In this case, the district court blurred two distinct forms of discharge that are separately regulated by Congress — diffuse discharges from solid waste and discharges from a point source — and concluded that any discharge from an identifiable source of coal ash, even that resulting from precipitation and groundwater seepage, is regulated by the Clean Water Act. But by concluding that the point-source requirement was satisfied by the pile or pond containing coal ash through which the water seeps, the court revealed a misunderstanding of the distinctions Congress made between the Clean Water Act and the RCRA. In describing how precipitation falls through the coal ash and percolates into the groundwater via the soil, the court identified a process that does not employ a discrete conveyance at all. The only "conveying" action referred to by the district court was that of the non-polluted water moving through static piles of coal ash and carrying arsenic into the soil. That water, as Sierra Club concedes, cannot itself be the requisite point source. Perhaps recognizing its need for finding a facility of conveyance, the court attempted abstractly to construct one, stating: "Dominion built the piles and ponds to concentrate coal ash, and its constituent pollutants, in one location," and "[t]hat one location channels and conveys arsenic directly into the groundwater." That movement of pollutants, however, was not a function of the coal ash piles or ponds, but rather the result of a natural process of "precipitation percolat[ing] through the soil to the groundwater."

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And that groundwater pollution from solid waste falls squarely within the regulatory scope of the RCRA. By contrast, the coal ash piles and ponds, from which arsenic diffusely seeped, can hardly be construed as discernible, confined, or discrete conveyances, as required by the Clean Water Act.

Sierra Club nonetheless maintains that at least the settling ponds were point sources because they were "containers," one of the facilities included as examples in the definition of point source. *See* 33 U.S.C. § 1362(14). But in so arguing, Sierra Club would have us read the critical, limiting word "conveyance" out of the definition. Regardless of whether a source is a pond or some other type of container, the source must still be functioning *as a conveyance* of the pollutant into navigable waters to qualify as a point source. In this case, the diffuse seepage of water through the ponds into the soil and groundwater does not make the pond a conveyance any more than it makes the landfill or soil generally a conveyance.

Sierra Club also seeks to support the district court's conclusion by pointing to several decisions from other courts, but they provide it with little assistance. In *United States v. Earth Sciences, Inc.*, for example, the court addressed overflows from a contaminated-water collection system, described by the court as a "closed *circulating* system," which involved the repeated spray, collection, and then pumping of a contaminated solution through the system — *i.e.*, a system of conveyances. 599 F.2d 368, 374 (10th Cir. 1979) (emphasis added). As such, when that system "fail[ed] because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, . . . the escape of liquid from the confined system [was] from a point source."

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In other words, in the process of *conveying* this contaminated liquid through the system, the liquid escaped. Likewise, in *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980), the court, while recognizing that the *source* of a pollutant regulated by § 1311(a) might be a spoil or refuse pile, noted that the facilities that actually transport the pollutant must be *point sources* — giving as examples, "ditches, gullies and similar conveyances." Rather than confirming the district court's conclusion, these cases undermine it, clearly identifying as point sources facilities, functioning as conveyances, from which the contaminant was discharged. The passive coal ash piles and ponds here are hardly analogous.

For the reasons given, we reverse the district court's ruling that Dominion violated § 1311(a) of the Clean Water Act.

V

On its cross-appeal, Sierra Club contends that the district court erred in ruling that Dominion did not violate general Conditions II.F and II.R to the Clean Water Act discharge permit issued by the VDEQ. Sierra Club argues that the same factual findings used by the district court to conclude that Dominion violated the Clean Water Act required the court to conclude that Dominion also violated the Conditions. In determining otherwise, according to Sierra Club, the district court disregarded the Conditions' clear language. More particularly, Sierra Club argues that the term "state waters," as used in both Conditions, is broader than the coverage of the Clean Water Act because Virginia Code § 62.1-44.3 defines "state waters" to include "all water, on the

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surface and under the ground." It thus contends that contamination of the groundwater alone violates the Conditions — contamination that the court found as fact in ruling on the Clean Water Act claim. It argues further that even if "state waters" do not include groundwater, the same discharges to navigable waters via hydrologically-connected groundwater identified by the district court should suffice to show a violation of the permit Conditions.

At trial, however, the VDEQ made clear that it did not consider the Clean Water Act discharge permits to cover groundwater contamination and that they only covered discharges from point sources into navigable waters, as stated in the Clean Water Act. Ruling in Dominion's favor, the district court stated that because the VDEQ "believes that [Dominion's] permits do not apply to groundwater, and therefore has found no violations," it was "defer[ring] to the [VDEQ's] decision finding Dominion in compliance."

While we might have wished for more explanation from the district court in support of its decision to defer, especially since Sierra Club argued that the VDEQ's position was not supported by the plain language of the permits, we agree with both the VDEQ and Dominion that the subject Conditions must be read in context to give them their appropriate meaning and scope.

The text of Condition II.F reads that "[e]xcept in compliance with this permit," "it shall be unlawful for any person to . . . [d]ischarge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances." (Emphasis added). In the context of the Clean Water Act, the phrase "discharge into state waters" has a

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particular meaning, and the VDEQ regulations recognize this, defining "discharge" to mean the addition of pollutants "from any *point source*." 9 Va. Admin. Code § 25-31-10 (emphasis added). Condition II.F thus operates as the Commonwealth's counterpart to the permit's expressly authorized discharges, reiterating 33 U.S.C. § 1311(a)'s prohibition against discharges from a point source not otherwise authorized by permit. Because we have concluded that arsenic seeping into the groundwater from the coal ash piles and ponds does not constitute a point-source discharge, we agree with the VDEQ that Dominion was also not violating Condition II.F.

Condition II.R must be understood in the same way. Like Condition II.F, Condition II.R is a general provision appended to all Clean Water Act discharge permits issued by the VDEQ. It provides that "[s]olids, sludges or other pollutants removed in the course of treatment or management of pollutants shall be disposed of in a manner so as to prevent any pollutant from such materials from entering state waters." While that language may appear to be broader than Condition II.F, insofar as it seems to prohibit "any pollutant from . . . entering state waters" (emphasis added), it nonetheless remains a condition limited in scope by its context in the Clean Water Act permit, which is specifically issued to regulate "discharges" into state waters. Were this selected language in Condition II.R to be given its literal meaning, it would subsume all the other permit conditions, as well as the substantive terms of the permit itself, which clearly authorize specified discharges. As one example, Condition I.D.7 states that all materials used in and by-products resulting from the facility's operation, including "industrial wastes," must be "handled, disposed of and/or stored in such a manner so as not to permit a

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discharge of such product, materials, industrial wastes and/or other wastes to State waters, except as expressly authorized." The VDEQ confirmed at trial that the coal ash stored in the landfill and ponds is "industrial waste" governed by this Condition. It would make little sense for the VDEQ to include this Condition, which, unlike Condition II.R, is particularized to the Chesapeake site, if Condition II.R were to nullify it by prohibiting any removed pollutant from any source and in any amount from reaching groundwater or surface water — as Sierra Club seeks to have us read it.

Moreover, the VDEQ has over the years consistently interpreted Condition II.R to apply only to point-source discharges to surface waters. It explained that the Condition is one of several boilerplate provisions that it appends to all discharge permits it issues, and that the Condition is included specifically to address the solids and sludges physically stored on site without appropriate storm water control, which could "result[] in a discharge or potential discharge" to surface waters. Dominion too stated that this was its understanding of II.R's scope and that this had been its understanding since the VDEQ first began issuing discharge permits to it. In addition, the VDEQ has never found Dominion to be in violation of the Condition, even when it knew, prior to issuing Dominion's most recent discharge permit, that groundwater monitoring reports indicated that arsenic was leaching into the groundwater. Thus, both parties to the permit shared an understanding of what the permit says and how it is to be enforced. See Restatement (Second) of Contracts § 201 cmt. c (1981) ("[T]he primary search is for a common meaning of the parties, not a meaning imposed on them by the law"); Ohio Valley Envtl.

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Coal. v. Fola Coal Co., LLC, 845 F.3d 133, 138 (4th Cir. 2017) (construing Clean Water Act permits as contracts would be construed).

Finally, our interpretation is confirmed when we consider the scope of the permit in its broader regulatory context. In addition to its discharge permit under the Clean Water Act, Dominion manages the Chesapeake site pursuant to a solid-waste permit under the RCRA and Virginia's Solid Waste Management laws. That permit and those laws authorized Dominion to store coal ash on the Chesapeake site, provided that Dominion complied with stated conditions and restrictions. Notably, Dominion was required to monitor the groundwater at the site, and in 2002 when it reported finding arsenic levels in the groundwater that exceeded Virginia's standards, it and the VDEQ developed a corrective action plan for the site in the context of the solid-waste permit under the RCRA. In addition, the VDEQ made clear throughout trial in this case that it continues to address the groundwater pollution, not through enforcement of the Clean Water Act discharge permit, but through enforcement of the solid-waste permit issued under the RCRA and Virginia's Solid Waste Management laws. It would thus upend this regulatory scheme to read a single, general condition included in Dominion's Clean Water Act discharge permit to cover conduct explicitly addressed elsewhere. If Sierra Club were intent on challenging the efforts of Dominion and the VDEQ in managing the coal ash storage, it could have sought to employ the RCRA's citizen-suit provision, 42 U.S.C. § 6972, to do so.

* * *

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For the reasons given, we reverse the district court's conclusion that Dominion violated the Clean Water Act, and we affirm its ruling that Dominion did not violate the two Conditions of its Clean Water Act discharge permit issued by the VDEQ.

AFFIRMED IN PART AND REVERSED IN PART

Message

From: Bulleit, Kristy [kbulleit@hunton.com]

Sent: 9/5/2018 6:35:15 PM

To: Fleischli, Steve [sfleischli@nrdc.org]; Ross, David P [ross.davidp@epa.gov]; Lieberman, Paige

[Lieberman.Paige@epa.gov]; 'brooks.smith@troutman.com' [brooks.smith@troutman.com]

CC: Steinbauer, Gary (GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]; Bulleit, Kristy

[kbulleit@hunton.com]

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues

for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt

Thanks for you helpful comments, Steve. Brooks and Dave, I'd be grateful if you'd weigh in on Steve's suggestion to combine WOTUS questions 2 and 3, and if you agree, let me know whether you'd prefer to allot that time to WOTUS question 4 or put the time into the TMDL/WQS issues. Also, let me know how you'd like to approach the TMDL/WQS issues, both in terms of specific questions and type/order of presentation.

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Kristy Bulleit

Partner kbulleit@HuntonAK.com p 202.955.1547 bio | vCard

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From: Fleischli, Steve [mailto:sfleischli@nrdc.org] Sent: Tuesday, September 04, 2018 6:08 PM

To: Bulleit, Kristy; David Ross (ross.davidp@epa.gov); 'Lieberman, Paige'; 'brooks.smith@troutman.com'

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com)

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater

issues for SEER Fall Meeting CWA Panel

Thanks for the prompt, Kristy. This approach generally seems fine with me. Responses to Question 3 could overlap with what is said in response to Question 2. It is good to call out the specific case law for this audience, but perhaps combining those two questions could give space for a TMDL/WQS question relating to WOTUS. On the DGW question to me, I made some edits for clarity (in yellow) since the sentence otherwise seemed incomplete.

Sincerely, Steve

From: Bulleit, Kristy <kbulleit@hunton.com> Sent: Tuesday, September 4, 2018 10:04 AM To: David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; 'Lieberman, Paige' <Lieberman.Paige@epa.gov>; 'brooks.smith@troutman.com' <brooks.smith@troutman.com>; Fleischli, Steve <sfleischli@nrdc.org>
Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com) <GSteinbauer@babstcalland.com>; Bulleit, Kristy <kbulleit@hunton.com>

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Also, just a gentle reminder that I look forward to receiving your draft written materials on Sept. 14th.

Best, Kristy

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As promised, I've been working on a list of possible questions we could use to guide our discussion on Oct. 19th Here are some suggestions for questions we might use to frame the presentations on WOTUS and discharge to groundwater issues. I'm still working on the TMDL/WQS questions, but I will send those once the group has addressed the question I pose below.

Please take a look at let me know what you think. If you would like to reframe the questions, delete or add questions, or simply prefer to consider a different approach, that's fine — all ideas are welcome. This is a just a starting point to get us thinking. I've also taken the liberty of attempting to allocate our time among the topics and speakers. Please weigh in on these allocations as well.

Please note: As you'll see, I've taken different organizational approaches to the questions on WOTUS and DGW. For WOTUS, once the background is out of the way, I've come up with a short list of questions that each panelist would be invited to address. I struggled to come up with a list short enough to allow for meaningful answers. If you'd like to see my (really long) list, let me know and I'll circulate it. If you'd prefer to use an approach that looks more like that proposed approach for DGW, let me know. Conversely, if you'd prefer to change the DGW organizational approach, let me know that too.

Because the schedule calls for you to send your draft papers to me by **September 14**, there is no need for you to use these questions as a template for your papers. That said, to the extent you choose use some of questions as a point of reference, feel free.

As you can see, fitting all three topics included in course description into an hour and a half will be a challenge. That said, I am mindful of the need to cover the topics advertised. I wonder

whether it might make sense to try to weave the TMDL issue into the presentations on the WOTUS and DGW issues, instead of attempting a free-standing discussion of TMDL developments. Here is my thought. It seems to me that WQS/TMDL issues are relevant to the ongoing debates on both WOTUS and DGW. Because states (and EPA, if states fail to act) must set WQS for all WOTUS, there are a range of issues that arise when waters less traditionally classified as "waters" or WOTUS are deemed jurisdictional. We could add to or modify the questions to inquire about how the WOTUS issue affects the establishment of WQS, establishment of TMDLs for those waters, or achievement of WQS or implementation of TMDLs for downstream waters. Similarly, for the DGW issue, many have argued that discharges via groundwater are nonpoint sources, and the Chesapeake Bay TMDLs demonstrates that the TMDLs program can be used to ensure that nonpoint sources that cause or contribute to WQS violations will be addressed. We could modify or add a question about how the ultimate resolution of the DGW issue, through rulemaking or Supreme Court review, affects the TMDLs program. If we choose to present the TMDL topic separately, we'll have to take time out of that allotted for answers to the questions posed below.

I'd be grateful if all of you (including you, Gary) would weigh in on this approach.

Paige and Dave: I suspect that, no matter what we decide, the WOTUS and discharge to groundwater issues will eat up a great deal of our time. For that reason, if EPA's paper could cover the state of play on regional WQS and TMDL issues (such as implementation of the Chesapeake Bay TMDL, any developments on other regional or high profile watershed TMDL issues), that would be really great.

Oct. 19, 10:30-noon

Bring session to order, brief overview and section announcements, introduction of speakers (10 minutes max)

Topic 1: WOTUS (35 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (5 minutes max)

Question 1 (**for Dave Ross**): [NOTE: the specific phrasing of this question will depend on what proposals or other actions EPA has put forth as of the date of the conference. As placeholder, I've included a general question] Dave, can you give us a brief overview of where EPA stands in its effort to propose a replacement rule, and what key issues it is targeting? (5 minutes)

Question 2: What, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? (10 minutes total) (proposed order: Steve, Brooks, Dave). (10 minutes total)

Question 3: How should the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* (plurality and concurrence) inform any rule? (proposed order: Brooks, Steve, Dave). (10 minutes total)

Bonus:

Question 4: If EPA ultimately chooses to draw the line more narrowly than the Obama Administration did, or than the 1986/1988 iterations did, what in your view will be the consequences for CWA implementation? (proposed order: Brooks, Steve). (We don't time for this, but I thought I'd throw it in anyway, for purposes of eliciting discussion.) (5 minutes total)

Topic 2: Discharge to surface water via hydrologically connected groundwater (30 minutes of presentation, 10 minutes of questions or discussion among panelists)

Kristy: 1-2 minute set up

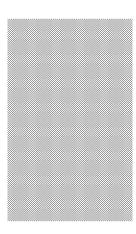
Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? 10 minutes)

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean Water Act permitting requirements, although the specific tests applied by the courts differ. We'd be interested to hear your views on the practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes?) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received ___ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score). (10 minutes)

Topic 3: TMDLs and related WQS issues (based on allocation above, this would have to be 10 minutes or less, unless we reallocate/shorten times above





Kristy Bulleit

Partner kbullert@HuntonAK com p 202.955.1547 bio | vCard

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This communication is confidential and is intended to be privileged pursuant to applicable law. If the reader of this message is not the intended recipient, please advise by return email immediately and then delete this message and all copies and backups thereof.

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Sent: 9/4/2018 5:03:48 PM

To: Ross, David P [ross.davidp@epa.gov]; Lieberman, Paige [Lieberman.Paige@epa.gov]; 'brooks.smith@troutman.com'

[brooks.smith@troutman.com]; 'Fleischli, Steve' [sfleischli@nrdc.org]

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Topic 3: TMDLs and related WQS issues (based on allocation above, this would have to be 10 minutes or less, unless we reallocate/shorten times above

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Message

From: Bulleit, Kristy [kbulleit@hunton.com]

Sent: 9/5/2018 6:35:15 PM

To: Fleischli, Steve [sfleischli@nrdc.org]; Ross, David P [ross.davidp@epa.gov]; Lieberman, Paige

[Lieberman.Paige@epa.gov]; 'brooks.smith@troutman.com' [brooks.smith@troutman.com]

CC: Steinbauer, Gary (GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]; Bulleit, Kristy

[kbulleit@hunton.com]

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues

for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt

Thanks for you helpful comments, Steve. Brooks and Dave, I'd be grateful if you'd weigh in on Steve's suggestion to combine WOTUS questions 2 and 3, and if you agree, let me know whether you'd prefer to allot that time to WOTUS question 4 or put the time into the TMDL/WQS issues. Also, let me know how you'd like to approach the TMDL/WQS issues, both in terms of specific questions and type/order of presentation.

* Technology could be Napal. The York Colors const, commit, control trap for the temporal to constituent control

Kristy Bulleit

Partner kbuileit@HuntonAK com p202.955.1547 bio | vCard

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From: Fleischli, Steve [mailto:sfleischli@nrdc.org] Sent: Tuesday, September 04, 2018 6:08 PM

To: Bulleit, Kristy; David Ross (ross.davidp@epa.gov); 'Lieberman, Paige'; 'brooks.smith@troutman.com'

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com)

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

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Sincerely, Steve

From: Bulleit, Kristy <kbulleit@hunton.com> **Sent:** Tuesday, September 4, 2018 10:04 AM

To: David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; 'Lieberman, Paige' <Lieberman.Paige@epa.gov>; 'brooks.smith@troutman.com' <brooks.smith@troutman.com>; Fleischli, Steve <sfleischli@nrdc.org>
Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com) <GSteinbauer@babstcalland.com>; Bulleit, Kristy <kbulleit@hunton.com>

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

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Also, just a gentle reminder that I look forward to receiving your draft written materials on Sept. 14th.

Best, Kristy

From: Bulleit, Kristy

Sent: Monday, August 27, 2018 4:28 PM

To: David Ross (ross.davidp@epa.gov); Lieberman, Paige; brooks.smith@troutman.com; Fleischli, Steve

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com); Bulleit, Kristy

Subject: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues

for SEER Fall Meeting CWA Panel

Importance: High

As promised, I've been working on a list of possible questions we could use to guide our discussion on Oct. 19th Here are some suggestions for questions we might use to frame the presentations on WOTUS and discharge to groundwater issues. I'm still working on the TMDL/WQS questions, but I will send those once the group has addressed the question I pose below.

Please take a look at let me know what you think. If you would like to reframe the questions, delete or add questions, or simply prefer to consider a different approach, that's fine — all ideas are welcome. This is a just a starting point to get us thinking. I've also taken the liberty of attempting to allocate our time among the topics and speakers. Please weigh in on these allocations as well.

Please note: As you'll see, I've taken different organizational approaches to the questions on WOTUS and DGW. For WOTUS, once the background is out of the way, I've come up with a short list of questions that each panelist would be invited to address. I struggled to come up with a list short enough to allow for meaningful answers. If you'd like to see my (really long) list, let me know and I'll circulate it. If you'd prefer to use an approach that looks more like that proposed approach for DGW, let me know. Conversely, if you'd prefer to change the DGW organizational approach, let me know that too.

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As you can see, fitting all three topics included in course description into an hour and a half will be a challenge. That said, I am mindful of the need to cover the topics advertised. I wonder

whether it might make sense to try to weave the TMDL issue into the presentations on the WOTUS and DGW issues, instead of attempting a free-standing discussion of TMDL developments. Here is my thought. It seems to me that WQS/TMDL issues are relevant to the ongoing debates on both WOTUS and DGW. Because states (and EPA, if states fail to act) must set WQS for all WOTUS, there are a range of issues that arise when waters less traditionally classified as "waters" or WOTUS are deemed jurisdictional. We could add to or modify the questions to inquire about how the WOTUS issue affects the establishment of WQS, establishment of TMDLs for those waters, or achievement of WQS or implementation of TMDLs for downstream waters. Similarly, for the DGW issue, many have argued that discharges via groundwater are nonpoint sources, and the Chesapeake Bay TMDLs demonstrates that the TMDLs program can be used to ensure that nonpoint sources that cause or contribute to WQS violations will be addressed. We could modify or add a question about how the ultimate resolution of the DGW issue, through rulemaking or Supreme Court review, affects the TMDLs program. If we choose to present the TMDL topic separately, we'll have to take time out of that allotted for answers to the questions posed below.

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Oct. 19, 10:30-noon

Bring session to order, brief overview and section announcements, introduction of speakers (10 minutes max)

Topic 1: WOTUS (35 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (5 minutes max)

Question 1 (**for Dave Ross**): [NOTE: the specific phrasing of this question will depend on what proposals or other actions EPA has put forth as of the date of the conference. As placeholder, I've included a general question] Dave, can you give us a brief overview of where EPA stands in its effort to propose a replacement rule, and what key issues it is targeting? (5 minutes)

Question 2: What, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? (10 minutes total) (proposed order: Steve, Brooks, Dave). (10 minutes total)

Question 3: How should the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* (plurality and concurrence) inform any rule? (proposed order: Brooks, Steve, Dave). (10 minutes total)

Bonus:

Question 4: If EPA ultimately chooses to draw the line more narrowly than the Obama Administration did, or than the 1986/1988 iterations did, what in your view will be the consequences for CWA implementation? (proposed order: Brooks, Steve). {We don't time for this, but I thought I'd throw it in anyway, for purposes of eliciting discussion.) (5 minutes total)

Topic 2: Discharge to surface water via hydrologically connected groundwater (30 minutes of presentation, 10 minutes of questions or discussion among panelists)

Kristy: 1-2 minute set up

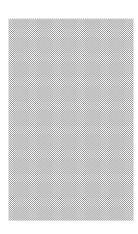
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Partner kbulleit@HuntonAK.com p202.955.1547 bio | vCard

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Message

From: Bulleit, Kristy [kbulleit@hunton.com]

Sent: 9/7/2018 3:46:53 PM

To: Fleischli, Steve [sfleischli@nrdc.org]; Smith, Brooks M. [Brooks.Smith@troutmansanders.com]

CC: Ross, David P [ross.davidp@epa.gov]; Lieberman, Paige [Lieberman.Paige@epa.gov]; Steinbauer, Gary

(GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]; Bulleit, Kristy [kbulleit@hunton.com]

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues

for SEER Fall Meeting CWA Panel

Let me think about a couple of questions for your consideration.

Kristy Bulleit Partner kbulleit@HuntonAK.com p 202.955.1547 bio | vCard

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----Original Message----

From: Fleischli, Steve [mailto:sfleischli@nrdc.org]

Sent: Friday, September 07, 2018 11:18 AM To: Bulleit, Kristy; Smith, Brooks M.

Cc: David Ross (ross.davidp@epa.gov); Lieberman, Paige; Steinbauer, Gary (GSteinbauer@babstcalland.com) Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

As luck would have it, I am an attorney on the LA Waterkeeper RDA case, so happy to have that thrown in the mix (although I am not yet sure how to wedge it in with the other topics).

----Original Message----

From: Bulleit, Kristy <kbulleit@hunton.com> Sent: Friday, September 7, 2018 7:51 AM

To: Smith, Brooks M. <Brooks.Smith@troutmansanders.com>

Cc: Fleischli, Steve <sfleischli@nrdc.org>; David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; Lieberman, Paige <Lieberman.Paige@epa.gov>; Steinbauer, Gary (GSteinbauer@babstcalland.com)

<GSteinbauer@babstcalland.com>; Bulleit, Kristy <kbulleit@hunton.com>

Subject: Re: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Thanks, Brooks. The WA thermal standard case would make an interesting discussion (both as to the original procedural question regarding the State's interpretation of the criteria and the subsequent TMDL

litigation) as would a case Gary suggested (the LA Riverkeeper RDA decision). Now we have to figure out how to wedge them in and tee them up. I welcome suggestions for reallocating time.

[Hunton Andrews Kurth]

Kristy Bulleit
Partner
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202.955.1547<tel:202.955.1547>

bio<http://webdownload.hunton.com/esignature/bio.aspx?U=03195> | vCard<http://webdownload.hunton.com/esignature/vcard.aspx?U=03195>

Hunton Andrews Kurth LLP 2200 Pennsylvania Avenue, NW<x-apple-data-detectors://1/1> Washington, DC 20037<x-apple-data-detectors://1/1> HuntonAK.comhttps://www.huntonak.com/?utm_source=esighunton&utm_medium=email&utm_campaign=esigtracking>

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On Sep 7, 2018, at 7:01 AM, Smith, Brooks M. <Brooks.Smith@troutmansanders.com</br>

Apologies for the delay. I think the outline and format look good. I am planning to focus my paper on the direct hydro connection issue.

On WQS/TMDL, there is an interesting case that EPA is defending in the Pacific Northwest, the latest in a line of cases targeting EPA's approval of temperature criteria and TMDLs. In the immediately preceding case, the court vacated EPA's approval of certain aspects of the criteria that dealt with background conditions. The plaintiffs then challenged the TMDLs that were established using those criteria, essentially claiming they were the fruit of the poisoned tree. The court agreed and we are now in the remedy phase (argument is next Tuesday in D. Or.). The question is whether the TMDLs should be vacated outright or whether they should remain in place. Our argument, in support of EPA, is that they remain useful and directionally correct and help to provide a blueprint for on-the-ground restoration activities. Not sure where this will go but it begs interesting questions about the interplay between WQSs and TMDLs, especially since modern TMDLs do far more than simply provide a calculation of LA + WLA + MOS = total cap.

When I spoke to Gary the other day, I suggested that we may also want to present a few Q&As on 401 water quality certifications. These have obviously become a big and controversial deal in interstate natural gas pipeline proceedings in multiple federal circuits, and I understand will also be a renewed area of focus for Congress. Happy to help frame some questions if others agree.

Best, Brooks

Brooks M. Smith troutman sanders Direct: 804.697.1414 brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>

From: Bulleit, Kristy <kbulleit@hunton.com<mailto:kbulleit@hunton.com>>
Sent: Wednesday, September 5, 2018 2:35 PM
To: Fleischli, Steve <sfleischli@nrdc.org<mailto:sfleischli@nrdc.org>>; David Ross
(ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>) <ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>>;
'Lieberman, Paige' <Lieberman.Paige@epa.gov<mailto:Lieberman.Paige@epa.gov>>; Smith, Brooks M.
<Brooks.Smith@troutmansanders.com<mailto:Brooks.Smith@troutmansanders.com>>

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<image001.jpg>
Kristy Bulleit
Partner
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202.955.1547

bio<https://urldefense.proofpoint.com/v2/url?u=http-3A__webdownload.hunton.com_esignature_bio.aspx-3FU-3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAngDqVYUC3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=KGLyYDRp922AXZOj3mmNGOoy7d1LOT4_oCx-6o3FYNA&e=> | vCard<https://urldefense.proofpoint.com/v2/url?u=http-3A__webdownload.hunton.com_esignature_vcard.aspx-3FU-

3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUZAngDqVYUC 3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=JyOSW2HJyEzV8ztHDkNMz1SL_OsT1O3183jzZa4662g&e=>

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Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>)
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Oct. 19, 10:30-noon

Bring session to order, brief overview and section announcements, introduction of speakers (10 minutes max)

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Topic 3: TMDLs and related WQS issues (based on allocation above, this would have to be 10 minutes or less, unless we reallocate/shorten times above

<image002.jpg>

Kristy Bulleit
Partner
kbulleit@HuntonAK.com<mailto:kbulleit@HuntonAK.com>p

202.955.1547

bio<https://urldefense.proofpoint.com/v2/url?u=http-3A__webdownload.hunton.com_esignature_bio.aspx-3FU-3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUZAngDqVYUC3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=KGLyYDRp922AXZOj3mmNG0oy7d1L0T4_oCx-6o3FYNA&e=> | vCard<https://urldefense.proofpoint.com/v2/url?u=http-3A__webdownload.hunton.com_esignature_vcard.aspx-3FU-

3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAngDqVYUC 3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=JyOSW2HJyEzV8ztHDkNMz1SL_OsT1O3183jzZa4662g&e=>

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Message

From: Bulleit, Kristy [kbulleit@hunton.com]

Sent: 10/4/2018 7:36:15 PM

To: Smith, Brooks M. [Brooks.Smith@troutman.com]; Steinbauer, Gary (GSteinbauer@babstcalland.com)

[GSteinbauer@babstcalland.com]; 'Fleischli, Steve' [sfleischli@nrdc.org]; Ross, David P [ross.davidp@epa.gov];

Lieberman, Paige [Lieberman.Paige@epa.gov]

CC: Nunnally, Heidi M. [Heidi.Nunnally@troutman.com]

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt

Excellent! Thanks, Brooks.



Kristy Bulleit

Partner kbulleit@HuntonAK.com p202.955.1547 bio | vCard

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From: Smith, Brooks M. [mailto:Brooks.Smith@troutman.com]

Sent: Thursday, October 04, 2018 2:56 PM

To: Bulleit, Kristy; Steinbauer, Gary (GSteinbauer@babstcalland.com); 'Fleischli, Steve'; David Ross

(ross.davidp@epa.gov); Lieberman, Paige

Cc: Nunnally, Heidi M.

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

With apologies for the delay, here's my paper. Best, Brooks

Brooks M. Smith

troutman sanders Direct: 804.697.1414

brooks.smith@troutman.com

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To: 'Fleischli, Steve' <sfleischli@nrdc.org>; David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; Smith, Brooks M.

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Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com) < GSteinbauer@babstcalland.com>; Bulleit, Kristy

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11:15 <u>Topic 2</u>: Discharge to surface water via hydrologically connected groundwater (25 minutes of presentation, 9 minutes of questions or discussion among panelists)

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Kristy – 1 minute set up

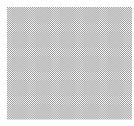
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Message

From: Bulleit, Kristy [kbulleit@hunton.com]

Sent: 10/4/2018 8:18:04 PM

To: Ross, David P [ross.davidp@epa.gov]; Lieberman, Paige [Lieberman.Paige@epa.gov]

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt

Actually, it looks like you got over 58,000 comments total. Does that sound right?

From: Bulleit, Kristy

Sent: Thursday, October 04, 2018 3:38 PM

To: David Ross (ross.davidp@epa.gov); Lieberman, Paige

Cc: Bulleit, Kristy

Subject: FW: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Importance: High

Dave and Paige, here's a question for you. By our calculations, EPA received about 900 unique (non-mass mail) comments on the FRN regarding discharges via groundwater, and over 53,000 total comments. Do those stats sound right to you?

From: Bulleit, Kristy

Sent: Thursday, October 04, 2018 2:17 PM

To: 'Fleischli, Steve'; David Ross (ross.davidp@epa.gov); Brooks M. Smith (brooks.smith@troutmansanders.com);

Lieberman, Paige

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com); Bulleit, Kristy

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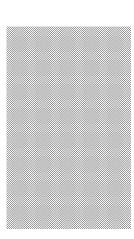
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Partner kbulleit@HuntonAK.com p202.955.1547 bio | vCard

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Sent: 10/4/2018 8:30:09 PM

To: Bulleit, Kristy [kbulleit@hunton.com]; Ross, David P [ross.davidp@epa.gov]; Brooks M. Smith

(brooks.smith@troutmansanders.com) [brooks.smith@troutmansanders.com]; Lieberman, Paige

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CC: Steinbauer, Gary (GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt

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Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com) <GSteinbauer@babstcalland.com>; Bulleit, Kristy <kbulleit@hunton.com>

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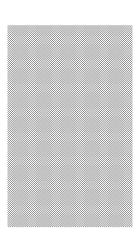
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CC: Steinbauer, Gary (GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

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Perfect! Thanks so much, Steve.



Kristy Bulleit

Partner kbulleit@HuntonAK.com p202.955.1547

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Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? **(8 minutes)**

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean Water Act permitting requirements, although the specific tests applied by the courts differ. Meanwhile, the Sixth Circuit recently concluded otherwise. We'd be interested

to hear your views on these cases and on the important differences that now divide the circuits. practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received ___ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score.] (8 minutes)

Questions: 9 minutes

11:44 <u>Topic 3</u>: The Heart of the Matter: Recent Developments in the Debate Over how Best to Attain Our Water Quality Goals

Kristy – 1 minute set up

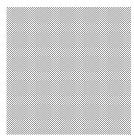
Question 1: Steve, whether and how to regulate storm water pollution has been the focus of a debate for decades. One important component of that larger question is which sources ought to be subject to the CWA's NPDES permit program. A recent decision from the Northern Central District of California, in a case brought by the LA Waterkeeper Riverkeeper, suggests that EPA may have an obligation to exercise its "residual designation" authority to require NPDES permits once EPA has determined that a source or class of sources is responsible for impairing water quality or is a significant contributor of pollutants. Could you comment on the implications of that case? In particular, we'd be interested in your views about whether, if EPA decides it must proceed with an RDA, it must first provide notice and an opportunity for public comment on the underlying determination and, if it does, whether other issues (such as questions about whether or not the sites qualify as point source) are likely to arise. (8 minutes)

(2) Brooks, a wave of litigation starting in the late 1980s prodded EPA and the States ramp up their efforts to identify impaired waters and establish TMDLs to designed bring those waters into attainment with applicable water quality standards. In many cases, the TMDL process represents the first instance in which the state and federal regulators have really considered how much pollutants are being added by nonpoint and point sources, including naturally occurring sources, and what it will take to achieve applicable WQS. Tell us a little about the kinds of issues that can arise in the course of that process. (7 minutes)





Kristy Bulleit
Partner
kbulleit@HuntonAK.com
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From: Lieberman, Paige [Lieberman.Paige@epa.gov]

Sent: 10/4/2018 9:05:11 PM

To: Bulleit, Kristy [kbulleit@hunton.com]; Ross, David P [ross.davidp@epa.gov]

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Hi Kristy – I believe that is correct, but let me double check.

From: Bulleit, Kristy [mailto:kbulleit@hunton.com]

Sent: Thursday, October 04, 2018 4:18 PM

To: Ross, David P <ross.davidp@epa.gov>; Lieberman, Paige <Lieberman.Paige@epa.gov>

Subject: RE: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Actually, it looks like you got over 58,000 comments total. Does that sound right?

From: Bulleit, Kristy

Sent: Thursday, October 04, 2018 3:38 PM

To: David Ross (ross.davidp@epa.gov); Lieberman, Paige

Cc: Bulleit, Kristy

Subject: FW: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Importance: High

Dave and Paige, here's a question for you. By our calculations, EPA received about 900 unique (non-mass mail) comments on the FRN regarding discharges via groundwater, and over 53,000 total comments. Do those stats sound right to you?

From: Bulleit, Kristy

Sent: Thursday, October 04, 2018 2:17 PM

To: 'Fleischli, Steve'; David Ross (ross.davidp@epa.gov); Brooks M. Smith (brooks.smith@troutmansanders.com);

Lieberman, Paige

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com); Bulleit, Kristy

Subject: Revised questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Importance: High

Steve, thanks for sending in your paper. Brooks, we look forward to seeing yours too.

Consistent with Steve's suggestion, I've revised the list of WOTUS questions by consolidating two of them. I've taken out the bonus question, which we clearly won't have time to address. As you prepare, please keep in mind the time limits I've assigned. I won't have a hook or a buzzer, but I reserve the right to move the proceedings along to make sure everyone gets a fair chance to say his piece.

I've also taken a stab at a question or two on a couple topics suggested by Steve and Brooks. I've aimed them at primarily at those two speakers, with the thought that I would ask Dave for any comments or reactions to their thoughts by way of closing. Please let me know what you think.

Oct. 19, 10:30-noon

10:30 Bring session to order, brief overview and section announcements, introduction of speakers (Kristy, 10 minutes max)

10:40 Topic 1: WOTUS (30 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (3 minutes max)

Question 1 (for Dave Ross): Dave, can you give us a brief overview of where EPA stands in its effort to reassess and, potentially, revise the 2015 WOTUS rule, and what key issues it is targeting? (5 minutes)

Question 2: Panelists, what, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? And, in particular, how should the Supreme Court's views on Congressional line drawing inform any rule? (proposed order: Steve, Brooks, Dave). (22 minutes total, 7 minutes apiece)

Questions: 5 minutes

11:15 <u>Topic 2</u>: Discharge to surface water via hydrologically connected groundwater (25 minutes of presentation, 9 minutes of questions or discussion among panelists)

Kristy: 1 minute set up

Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? **(8 minutes)**

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean Water Act permitting requirements, although the specific tests applied by the courts differ. We'd be interested to hear your views on the practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received ___ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score.] (8 minutes)

Questions: 9 minutes

11:44 <u>Topic 3</u>: The Heart of the Matter: Recent Developments in the Debate Over how Best to Attain Our Water Quality Goals

Kristy – 1 minute set up

Question 1: Steve, whether and how to regulate storm water pollution has been the focus of a debate for decades. One important component of that larger question is which sources ought to be subject to the CWA's NPDES permit program. A recent decision from the Northern District of California, in a case brought by the LA Riverkeeper, suggests that EPA may have an obligation to exercise its "residual designation" authority to require NPDES permits once EPA has determined that a source or class of sources is responsible for impairing water quality or is a significant contributor of pollutants. Could you comment on the implications of that case? In particular, we'd be interested in your views about whether, if EPA decides it must proceed with an RDA, it must first provide notice and an opportunity for public comment on the underlying determination and, if it does, whether other issues (such as questions about whether or not the sites qualify as point source) are likely to arise. (8 minutes)

(2) Brooks, a wave of litigation starting in the late 1980s prodded EPA and the States ramp up their efforts to identify impaired waters and establish TMDLs to designed bring those waters into attainment with applicable water quality standards. In many cases, the TMDL process represents the first instance in which the state and federal regulators have really considered how much pollutants are being added by nonpoint and point sources, including naturally occurring sources, and what it will take to achieve applicable WQS. Tell us a little about the kinds of issues that can arise in the course of that process. (7 minutes)

** The Marie Institute and he display for the angles of many amount, artificial Staff before the contribution to the contributions.

Kristy Bulleit

Partner kbulleit@HuntonAK.com p202.955.1547 bio | vCard

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From: Bond, Alexander [ABond@eei.org]

Sent: 4/18/2018 5:11:25 PM

To: Ross, David P [ross.davidp@epa.gov]; Leopold, Matt (OGC) [Leopold.Matt@epa.gov]

CC: Veney, Carla [Veney.Carla@epa.gov]; Mills, Derek [Mills.Derek@epa.gov]; Penman, Crystal

[Penman.Crystal@epa.gov]

Subject: Direct hydrological connection meeting request

David & Matt -

Hope all is well with both of you—and, Matt, I hope your travel home last week went smoothly. We were hoping to find some small window of time on both (or at least one of) your schedules in the next few weeks to discuss the direct hydrological connection set of issues—hopefully before May 10 given travel schedules of some of our internal folks. Our intent is to focus discussion on some of the substantive issues, but also some strategic options that may be available, knowing that the issue is moving on both the judicial and regulatory fronts. Any availability would be wonderful, and we know that you are both extremely busy at the moment, so we are more than happy to be flexible.

Thank you so much!

Alex

--

Alex Bond
Associate General Counsel, Energy & Environment
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696
202-508-5523
www.eei.org

Follow EEI on Twitter, Facebook, and YouTube.



From: Smith, Brooks M. [Brooks.Smith@troutmansanders.com]

Sent: 9/12/2018 1:05:33 PM

To: Bulleit, Kristy [kbulleit@hunton.com]; Fleischli, Steve [sfleischli@nrdc.org]; Ross, David P [ross.davidp@epa.gov];

Lieberman, Paige [Lieberman.Paige@epa.gov]

CC: Steinbauer, Gary (GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues

for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt; Document.pdf

The Fourth Circuit issued its opinion in the Dominion coal ash case today, ruling that the ash piles were not point sources and affirming DEQ's interpretation of the permit. This should be good fodder for our panel and a nice contrast to some of the other recent "direct hydrologic connection" cases. Best, Brooks

Brooks M. Smith

troutman sanders Direct: 804.697.1414

brooks.smith@troutman.com

From: Smith, Brooks M.

Sent: Friday, September 7, 2018 6:58 AM

To: Bulleit, Kristy <kbulleit@hunton.com>; Fleischli, Steve <sfleischli@nrdc.org>; David Ross (ross.davidp@epa.gov)

<ross.davidp@epa.gov>; 'Lieberman, Paige' <Lieberman.Paige@epa.gov>

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com) < GSteinbauer@babstcalland.com>

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater

issues for SEER Fall Meeting CWA Panel

Apologies for the delay. I think the outline and format look good. I am planning to focus my paper on the direct hydro connection issue.

On WQS/TMDL, there is an interesting case that EPA is defending in the Pacific Northwest, the latest in a line of cases targeting EPA's approval of temperature criteria and TMDLs. In the immediately preceding case, the court vacated EPA's approval of certain aspects of the criteria that dealt with background conditions. The plaintiffs then challenged the TMDLs that were established using those criteria, essentially claiming they were the fruit of the poisoned tree. The court agreed and we are now in the remedy phase (argument is next Tuesday in D. Or.). The question is whether the TMDLs should be vacated outright or whether they should remain in place. Our argument, in support of EPA, is that they remain useful and directionally correct and help to provide a blueprint for on-the-ground restoration activities. Not sure where this will go but it begs interesting questions about the interplay between WQSs and TMDLs, especially since modern TMDLs do far more than simply provide a calculation of LA + WLA + MOS = total cap.

When I spoke to Gary the other day, I suggested that we may also want to present a few Q&As on 401 water quality certifications. These have obviously become a big and controversial deal in interstate natural gas pipeline proceedings in multiple federal circuits, and I understand will also be a renewed area of focus for Congress. Happy to help frame some questions if others agree.

Best, Brooks

Brooks M. Smith troutman sanders Direct: 804.697.1414 From: Bulleit, Kristy <kbulleit@hunton.com>
Sent: Wednesday, September 5, 2018 2:35 PM

To: Fleischli, Steve <sfleischli@nrdc.org>; David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; 'Lieberman, Paige'

<Lieberman.Paige@epa.gov>; Smith, Brooks M. <Brooks.Smith@troutmansanders.com>

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com) <GSteinbauer@babstcalland.com>; Bulleit, Kristy <kbulleit@hunton.com>

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Thanks for you helpful comments, Steve. Brooks and Dave, I'd be grateful if you'd weigh in on Steve's suggestion to combine WOTUS questions 2 and 3, and if you agree, let me know whether you'd prefer to allot that time to WOTUS question 4 or put the time into the TMDL/WQS issues. Also, let me know how you'd like to approach the TMDL/WQS issues, both in terms of specific questions and type/order of presentation.



Kristy Bulleit

Partner kbulleit@HuntonAK.com p202.955.1547 bio | vCard

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From: Fleischli, Steve [mailto:sfleischli@nrdc.org]
Sent: Tuesday, September 04, 2018 6:08 PM

To: Bulleit, Kristy; David Ross (ross.davidp@epa.gov); 'Lieberman, Paige'; 'brooks.smith@troutman.com'

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com)

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Thanks for the prompt, Kristy. This approach generally seems fine with me. Responses to Question 3 could overlap with what is said in response to Question 2. It is good to call out the specific case law for this audience, but perhaps combining those two questions could give space for a TMDL/WQS question relating to WOTUS. On the DGW question to me, I made some edits for clarity (in yellow) since the sentence otherwise seemed incomplete.

Sincerely, Steve From: Bulleit, Kristy < kbulleit@hunton.com>
Sent: Tuesday, September 4, 2018 10:04 AM

To: David Ross (ross.davidp@epa.gov) <ross.davidp@epa.gov>; 'Lieberman, Paige' <Lieberman.Paige@epa.gov>;

'brooks.smith@troutman.com' <<u>brooks.smith@troutman.com</u>>; Fleischli, Steve <<u>sfleischli@nrdc.org</u>> **Cc:** Steinbauer, Gary (<u>GSteinbauer@babstcalland.com</u>) <<u>GSteinbauer@babstcalland.com</u>>; Bulleit, Kristy <kbulleit@hunton.com>

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Hello, all. I'm just checking in because I have received zero input on this proposal, so first and foremost I wanted to make sure you all received it. I suspect that some of you, like Steve, were on vacation. In any case, please take a look as soon as possible and share your views.

Also, just a gentle reminder that I look forward to receiving your draft written materials on Sept. 14th.

Best, Kristy

From: Bulleit, Kristy

Sent: Monday, August 27, 2018 4:28 PM

To: David Ross (ross.davidp@epa.gov); Lieberman, Paige; brooks.smith@troutman.com; Fleischli, Steve

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com); Bulleit, Kristy

Subject: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues

for SEER Fall Meeting CWA Panel

Importance: High

As promised, I've been working on a list of possible questions we could use to guide our discussion on Oct. 19th Here are some suggestions for questions we might use to frame the presentations on WOTUS and discharge to groundwater issues. I'm still working on the TMDL/WQS questions, but I will send those once the group has addressed the question I pose below.

Please take a look at let me know what you think. If you would like to reframe the questions, delete or add questions, or simply prefer to consider a different approach, that's fine — all ideas are welcome. This is a just a starting point to get us thinking. I've also taken the liberty of attempting to allocate our time among the topics and speakers. Please weigh in on these allocations as well.

Please note: As you'll see, I've taken different organizational approaches to the questions on WOTUS and DGW. For WOTUS, once the background is out of the way, I've come up with a short list of questions that each panelist would be invited to address. I struggled to come up with a list short enough to allow for meaningful answers. If you'd like to see my (really long) list, let me know and I'll circulate it. If you'd prefer to use an approach that looks more like that proposed approach for DGW, let me know. Conversely, if you'd prefer to change the DGW organizational approach, let me know that too.

Because the schedule calls for you to send your draft papers to me by **September 14**, there is no need for you to use these questions as a template for your papers. That said, to the extent you choose use some of questions as a point of reference, feel free.

As you can see, fitting all three topics included in course description into an hour and a half will be a challenge. That said, I am mindful of the need to cover the topics advertised. I wonder whether it might make sense to try to weave the TMDL issue into the presentations on the WOTUS and DGW issues, instead of attempting a free-standing discussion of TMDL developments. Here is my thought. It seems to me that WQS/TMDL issues are relevant to the ongoing debates on both WOTUS and DGW. Because states (and EPA, if states fail to act) must set WQS for all WOTUS, there are a range of issues that arise when waters less traditionally classified as "waters" or WOTUS are deemed jurisdictional. We could add to or modify the questions to inquire about how the WOTUS issue affects the establishment of WQS, establishment of TMDLs for those waters, or achievement of WQS or implementation of TMDLs for downstream waters. Similarly, for the DGW issue, many have argued that discharges via groundwater are nonpoint sources, and the Chesapeake Bay TMDLs demonstrates that the TMDLs program can be used to ensure that nonpoint sources that cause or contribute to WQS violations will be addressed. We could modify or add a question about how the ultimate resolution of the DGW issue, through rulemaking or Supreme Court review, affects the TMDLs program. If we choose to present the TMDL topic separately, we'll have to take time out of that allotted for answers to the questions posed below.

I'd be grateful if all of you (including you, Gary) would weigh in on this approach.

Paige and Dave: I suspect that, no matter what we decide, the WOTUS and discharge to groundwater issues will eat up a great deal of our time. For that reason, if EPA's paper could cover the state of play on regional WQS and TMDL issues (such as implementation of the Chesapeake Bay TMDL, any developments on other regional or high profile watershed TMDL issues), that would be really great.

Oct. 19, 10:30-noon

Bring session to order, brief overview and section announcements, introduction of speakers (10 minutes max)

Topic 1: WOTUS (35 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (5 minutes max)

Question 1 (**for Dave Ross**): [NOTE: the specific phrasing of this question will depend on what proposals or other actions EPA has put forth as of the date of the conference. As placeholder, I've included a general question] Dave, can you give us a brief overview of where EPA stands in its effort to propose a replacement rule, and what key issues it is targeting? (5 minutes)

Question 2: What, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? (10 minutes total) (proposed order: Steve, Brooks, Dave). (10 minutes total)

Question 3: How should the Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* (plurality and concurrence) inform any rule? (proposed order: Brooks, Steve, Dave). (10 minutes total)

Bonus:

Question 4: If EPA ultimately chooses to draw the line more narrowly than the Obama Administration did, or than the 1986/1988 iterations did, what in your view will be the consequences for CWA implementation? (proposed order: Brooks, Steve). {We don't time for this, but I thought I'd throw it in anyway, for purposes of eliciting discussion.) (5 minutes total)

Topic 2: Discharge to surface water via hydrologically connected groundwater (30 minutes of presentation, 10 minutes of questions or discussion among panelists)

Kristy: 1-2 minute set up

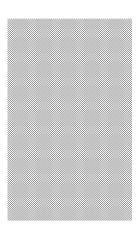
Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? 10 minutes)

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean Water Act permitting requirements, although the specific tests applied by the courts differ. We'd be interested to hear your views on the practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes?) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received ___ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score). (10 minutes)

Topic 3: TMDLs and related WQS issues (based on allocation above, this would have to be 10 minutes or less, unless we reallocate/shorten times above





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From: Bulleit, Kristy [kbulleit@hunton.com]

9/12/2018 1:17:44 PM Sent:

Smith, Brooks M. [Brooks.Smith@troutmansanders.com] To:

CC: Fleischli, Steve [sfleischli@nrdc.org]; Ross, David P [ross.davidp@epa.gov]; Lieberman, Paige

[Lieberman.Paige@epa.gov]; Steinbauer, Gary (GSteinbauer@babstcalland.com) [GSteinbauer@babstcalland.com]

Re: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues Subject:

for SEER Fall Meeting CWA Panel

Attachments: ATT00001.txt; image002.jpg

Thanks Brooks. I'll Look at the decision and consider what this suggests about the appropriate distribution of time for the panel discussion.

[Hunton Andrews Kurth]

Kristy Bulleit

Partner

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On Sep 12, 2018, at 9:06 AM, Smith, Brooks M. <Brooks.Smith@troutmansanders.com<mailto:Brooks.Smith@troutmansanders.com>> wrote:

The Fourth Circuit issued its opinion in the Dominion coal ash case today, ruling that the ash piles were not point sources and affirming DEQ's interpretation of the permit. This should be good fodder for our panel and a nice contrast to some of the other recent "direct hydrologic connection" cases. Best, Brooks

Brooks M. Smith troutman sanders Direct: 804.697.1414

brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>

From: Smith, Brooks M.

Sent: Friday, September 7, 2018 6:58 AM
To: Bulleit, Kristy <kbulleit@hunton.com<mailto:kbulleit@hunton.com>>; Fleischli, Steve

<sfleischli@nrdc.org<mailto:sfleischli@nrdc.org>>; David Ross

(ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>) <ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>>;

Lieberman, Paige' <Lieberman.Paige@epa.gov<mailto:Lieberman.Paige@epa.gov>>

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>)

<GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>>

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Apologies for the delay. I think the outline and format look good. I am planning to focus my paper on the direct hydro connection issue.

On WQS/TMDL, there is an interesting case that EPA is defending in the Pacific Northwest, the latest in a line of cases targeting EPA's approval of temperature criteria and TMDLs. In the immediately preceding case, the court vacated EPA's approval of certain aspects of the criteria that dealt with background conditions. The plaintiffs then challenged the TMDLs that were established using those criteria, essentially claiming they were the fruit of the poisoned tree. The court agreed and we are now in the remedy phase (argument is next Tuesday in D. Or.). The question is whether the TMDLs should be vacated outright or whether they should remain in place. Our argument, in support of EPA, is that they remain useful and directionally correct and help to provide a blueprint for on-the-ground restoration activities. Not sure where this will go but it begs interesting questions about the interplay between WQSs and TMDLs, especially since modern TMDLs do far more than simply provide a calculation of LA + WLA + MOS = total cap.

When I spoke to Gary the other day, I suggested that we may also want to present a few Q&As on 401 water quality certifications. These have obviously become a big and controversial deal in interstate natural gas pipeline proceedings in multiple federal circuits, and I understand will also be a renewed area of focus for Congress. Happy to help frame some questions if others agree.

Best, Brooks

Brooks M. Smith troutman sanders Direct: 804.697.1414

brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>

From: Bulleit, Kristy <kbulleit@hunton.com<mailto:kbulleit@hunton.com>>

Sent: Wednesday, September 5, 2018 2:35 PM

To: Fleischli, Steve <sfleischli@nrdc.org<mailto:sfleischli@nrdc.org>>; David Ross

(ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>) <ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>>;

'Lieberman, Paige' <Lieberman.Paige@epa.gov<mailto:Lieberman.Paige@epa.gov>>; Smith, Brooks M.

<Brooks.Smith@troutmansanders.com<mailto:Brooks.Smith@troutmansanders.com>>

Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>)

<GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>>; Bulleit, Kristy

<kbulleit@hunton.com<mailto:kbulleit@hunton.com>>

Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Thanks for you helpful comments, Steve. Brooks and Dave, I'd be grateful if you'd weigh in on Steve's suggestion to combine WOTUS questions 2 and 3, and if you agree, let me know whether you'd prefer to allot that time to WOTUS question 4 or put the time into the TMDL/WQS issues. Also, let me know how you'd like to approach the TMDL/WQS issues, both in terms of specific questions and type/order of presentation.

<image001.jpg>

Kristy Bulleit
Partner
kbulleit@HuntonAK.com<mailto:kbulleit@HuntonAK.com>
p

202.955.1547

bio<https://urldefense.proofpoint.com/v2/url?u=http-3A__webdownload.hunton.com_esignature_bio.aspx-3FU-3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAngDqVYUC3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=KGLyYDRp922AXZOj3mmNG0oy7d1LOT4_oCx-6o3FYNA&e=> | vCard<https://urldefense.proofpoint.com/v2/url?u=http-3A__webdownload.hunton.com_esignature_vcard.aspx-3FU-

3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAngDqVYUC 3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=JyOSW2HJyEzV8ztHDkNMz1SL_OsT1O3183jzZa4662g&e=>

Hunton Andrews Kurth LLP 2200 Pennsylvania Avenue, NW Washington, DC 20037 HuntonAK.com<a href="https://urldefel

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3Desigtracking&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAn

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From: Fleischli, Steve [mailto:sfleischli@nrdc.org]
Sent: Tuesday, September 04, 2018 6:08 PM
To: Bulleit, Kristy; David Ross (ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>); 'Lieberman, Paige'; 'brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>'
Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>)
Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via Groundwater issues for SEER Fall Meeting CWA Panel

Thanks for the prompt, Kristy. This approach generally seems fine with me. Responses to Question 3 could overlap with what is said in response to Question 2. It is good to call out the specific case law for this audience, but perhaps combining those two questions could give space for a TMDL/WQS question relating to WOTUS. On the DGW question to me, I made some edits for clarity (in yellow) since the sentence otherwise seemed incomplete.

Sincerely,

From: Bulleit, Kristy <kbulleit@hunton.com<mailto:kbulleit@hunton.com>>
Sent: Tuesday, September 4, 2018 10:04 AM
To: David Ross (ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>)
<ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>>; 'Lieberman, Paige'
<Lieberman.Paige@epa.gov<mailto:Lieberman.Paige@epa.gov>>;
'brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>'
<brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>>; Fleischli, Steve
<sfleischli@nrdc.org<mailto:sfleischli@nrdc.org>>
Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>)
<GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>>; Bulleit, Kristy
<kbulleit@hunton.com<mailto:kbulleit@hunton.com>>
Subject: RE: Important - For your review and input **Proposed questions on WOTUS and Discharge via
Groundwater issues for SEER Fall Meeting CWA Panel

Hello, all. I'm just checking in because I have received zero input on this proposal, so first and foremost I wanted to make sure you all received it. I suspect that some of you, like Steve, were on vacation. In any case, please take a look as soon as possible and share your views.

Also, just a gentle reminder that I look forward to receiving your draft written materials on Sept. 14th.

Best, Kristy

From: Bulleit, Kristy
Sent: Monday, August 27, 2018 4:28 PM
To: David Ross (ross.davidp@epa.gov<mailto:ross.davidp@epa.gov>); Lieberman, Paige;
brooks.smith@troutman.com<mailto:brooks.smith@troutman.com>; Fleischli, Steve
Cc: Steinbauer, Gary (GSteinbauer@babstcalland.com<mailto:GSteinbauer@babstcalland.com>); Bulleit, Kristy
Subject: Important - For your review and input **Proposed questions on WOTUS and Discharge via
Groundwater issues for SEER Fall Meeting CWA Panel
Importance: High

As promised, I've been working on a list of possible questions we could use to guide our discussion on Oct. 19th Here are some suggestions for questions we might use to frame the presentations on WOTUS and discharge to groundwater issues. I'm still working on the TMDL/WQS questions, but I will send those once the group has addressed the question I pose below.

Please take a look at let me know what you think. If you would like to reframe the questions, delete or add questions, or simply prefer to consider a different approach, that's fine — all ideas are welcome. This is a just a starting point to get us thinking. I've also taken the liberty of attempting to allocate our time among the topics and speakers. Please weigh in on these allocations as well.

Please note: As you'll see, I've taken different organizational approaches to the questions on WOTUS and DGW. For WOTUS, once the background is out of the way, I've come up with a short list of questions that

each panelist would be invited to address. I struggled to come up with a list short enough to allow for meaningful answers. If you'd like to see my (really long) list, let me know and I'll circulate it. If you'd prefer to use an approach that looks more like that proposed approach for DGW, let me know. Conversely, if you'd prefer to change the DGW organizational approach, let me know that too.

Because the schedule calls for you to send your draft papers to me by September 14, there is no need for you to use these questions as a template for your papers. That said, to the extent you choose use some of questions as a point of reference, feel free.

As you can see, fitting all three topics included in course description into an hour and a half will be a challenge. That said, I am mindful of the need to cover the topics advertised. I wonder whether it might make sense to try to weave the TMDL issue into the presentations on the WOTUS and DGW issues, instead of attempting a free-standing discussion of TMDL developments. Here is my thought. It seems to me that WQS/TMDL issues are relevant to the ongoing debates on both WOTUS and DGW. Because states (and EPA, if states fail to act) must set WQS for all WOTUS, there are a range of issues that arise when waters less traditionally classified as "waters" or WOTUS are deemed jurisdictional. We could add to or modify the questions to inquire about how the WOTUS issue affects the establishment of WQS, establishment of TMDLs for those waters, or achievement of WQS or implementation of TMDLs for downstream waters. Similarly, for the DGW issue, many have argued that discharges via groundwater are nonpoint sources, and the Chesapeake Bay TMDLs demonstrates that the TMDLs program can be used to ensure that nonpoint sources that cause or contribute to WQS violations will be addressed. We could modify or add a question about how the ultimate resolution of the DGW issue, through rulemaking or Supreme Court review, affects the TMDLs program. If we choose to present the TMDL topic separately, we'll have to take time out of that allotted for answers to the questions posed below.

I'd be grateful if all of you (including you, Gary) would weigh in on this approach.

Paige and Dave: I suspect that, no matter what we decide, the WOTUS and discharge to groundwater issues will eat up a great deal of our time. For that reason, if EPA's paper could cover the state of play on regional WQS and TMDL issues (such as implementation of the Chesapeake Bay TMDL, any developments on other regional or high profile watershed TMDL issues), that would be really great.

Oct. 19, 10:30-noon

Bring session to order, brief overview and section announcements, introduction of speakers (10 minutes max)

Topic 1: WOTUS (35 minutes of presentation, 5 minutes of questions)

Kristy: Intro and set up (5 minutes max)

Question 1 (for Dave Ross): [NOTE: the specific phrasing of this question will depend on what proposals or other actions EPA has put forth as of the date of the conference. As placeholder, I've included a general question] Dave, can you give us a brief overview of where EPA stands in its effort to propose a replacement rule, and what key issues it is targeting? (5 minutes)

Question 2: What, in your view, are the most important legal, scientific, and public policy factors that should inform any final definition of "waters of the United States"? Put another way, where do you think Congress intended to draw the line? (10 minutes total) (proposed order: Steve, Brooks, Dave). (10 minutes total)

Question 3: How should the Supreme Court's decisions in Riverside Bayview, SWANCC, and Rapanos (plurality and concurrence) inform any rule? (proposed order: Brooks, Steve, Dave). (10 minutes total)

Question 4: If EPA ultimately chooses to draw the line more narrowly than the Obama Administration did, or than the 1986/1988 iterations did, what in your view will be the consequences for CWA implementation? (proposed order: Brooks, Steve). {we don't time for this, but I thought I'd throw it in anyway, for purposes of eliciting discussion.) (5 minutes total)

Topic 2: Discharge to surface water via hydrologically connected groundwater (30 minutes of presentation, 10 minutes of questions or discussion among panelists)

Kristy: 1-2 minute set up

Brooks, could you give us a brief overview of the nature of the debate, and the differing views expressed over time by EPA, different stakeholders, and courts? 10 minutes)

Steve, as Brooks' overview indicates, the 9th and 4th Circuits recently have issued decisions holding that discharges to surface waters of the U.S. via hydrologically connected groundwater are subject to Clean

Water Act permitting requirements, although the specific tests applied by the courts differ. We'd be interested to hear your views on the practical differences between the two tests, as well as any thoughts you have on the arguments made by litigants and other stakeholders who have argued that those two circuits got it wrong. (8 minutes?) [If time permits, it would be interesting to hear your views on how discharges via groundwater could be permitted through the NPDES program)

Dave, on February 20th of this year, EPA issued a Federal Register notice soliciting comment on whether "EPA should review and potentially revise its previous statements concerning the applicability of the CWA NPDES program to pollutant discharges from point sources that reach jurisdictional surface waters via ground water or other subsurface flow that has a direct hydrological connection to a jurisdictional surface water." EPA is said to have received __ original substantive comments. What themes do you discern from those comments, and can you give us any sense for what steps, if any, EPA is contemplating in response and what the time frame might be? [If there have been developments in relation to the petitions for certiorari that will be filed in August, and you are in a position to share anything, I'm sure the audience would be interested in any points you may want to make on that score). (10 minutes)

Topic 3: TMDLs and related WQS issues (based on allocation above, this would have to be 10 minutes or less, unless we reallocate/shorten times above

<image002.jpg>

Kristy Bulleit Partner kbulleit@HuntonAK.com<mailto:kbulleit@HuntonAK.com> p

202.955.1547

bio<https://urldefense.proofpoint.com/v2/url?u=http-3A__webdownload.hunton.com_esignature_bio.aspx-3FU-3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAngDqVYUC3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=KGLyYDRp922AXZOj3mmNG0oy7d1LOT4_oCx-6o3FYNA&e=> | vCard<https://urldefense.proofpoint.com/v2/url?u=http-3A__webdownload.hunton.com_esignature_vcard.aspx-3FU-

3D03195&d=DwMFAg&c=Fcy_tm8maX9AUK604DXgKAjxg7xdv9dWt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAngDqVYUC3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=JyOSW2HJyEzV8ztHDkNMz1SL_OsT1O3183jzZa4662g&e=>

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3Desigtracking&d=DwMFAg&c=Fcy_tm8max9AUK604DXgKAjxg7xdv9dwt7ej19GNGLQ&r=O7PPg9C22GcqX_dsHmdJPn9X_tMbYUzAngDqVYUC3bw&m=xk0PG5SsBzjx8hdEizOOvd4ZCfgGXPw4a5g_CaYPAcs&s=aD6LmL4zFFXpG6x2JpzX-GrnyzNfZ3gJmqvrVH7Cea8&e=>

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From: McGrath, Kerry L. [KMcGrath@hunton.com]

Sent: 1/2/2019 7:16:49 PM

To: Ross, David P [ross.davidp@epa.gov]

CC: Lieberman, Paige [Lieberman.Paige@epa.gov]; Penman, Crystal [Penman.Crystal@epa.gov]; Brown, Samuel L.

[SIBrown@hunton.com]

Subject: Invitation to Speak at ELI-ALI event on May 2 at 1 p.m.

Attachments: Draft CWA ELI ALI CLE Agenda Outline.docx

Dave-

Happy New Year! I hope this note finds you well. My partner, Sam Brown, is planning an <u>ELI-ALI Clean Water Act: Law and Regulation</u> event at the Hunton office in DC (2200 Pennsylvania Ave NW) on <u>May 2, 2019</u>. We would like to invite you to participate as the keynote speaker at the event. The keynote address is scheduled for 1-2 p.m. There are always other EPA and federal government panelists and we expect there will be again this year. The draft agenda is attached and here is a link to last year's event: https://www.ali-cle.org/course/Clean-Water-Act-Law-and-Regulation-CZ010?ondemand=ondemand.

We are open to structuring the keynote format however you prefer. You can plan to speak for 30 minutes or we can do more of a Q&A as we did for the Insights event here in November. The goal would be for you to provide an overview of the key issues and developments in OW, which will likely align with the other panels.

Please let us know if you are available to participate as they keynote speaker. We'd love to have you.

Thanks, Kerry



Kerry McGrath

Partner KMcGrath@HuntonAK.com p 202.955.1519 bio | vCard

Hunton Andrews Kurth LLP 2200 Pennsylvania Avenue, NW Washington, DC 20037

HuntonAK.com

Overview:

May 2, Day 1 (Time)	Day 1 (Subject)	May 3, Day 2 (Time)	Day 2 (Subject)
8:00am-8:45am	Registration	8:00am-8:30am	Breakfast
8:45am -9:45am	(1) CWA Introduction	8:30am-9:45am	(6) Stormwater and
	(Steve Neugeboren)		Wastewater (Rachel)
9:45am-10:00am	Introductory Remarks	9:45-11:00am	(7) PFAS (Rachel)
10:00am-11:15am	(2) WOTUS (Meredith)	11:00am-11:15am	Networking Break
11:15am-11:30	Networking Break	11:15am-12:30pm	(8) Cooperative
			Federalism and 401
			Cert (Meredith)
11:30am-12:45pm	(3) Direct Hydrologic	12:30pm-1:45pm	Lunch
	Connection (Sam)		
12:45pm-2:00pm	Lunch – Keynote	1:45pm-3:00pm	(9) CWA and Other
	(David Ross)		Federal Authorities
			(Sam)
2:00pm-3:15pm	(4) Water Quality	3:00pm-3:15pm	Networking Break
	Standards (Sam)		
3:15pm-3:30pm	Networking Break	3:15pm-4:15pm	(10) Ethics (Rachel)
3:30pm-4:45pm	(5) Enforcement	4:15pm	Adjourn for Day
	(Meredith)		
4:45pm	Adjourn for Day		

Day One - May 2, 2019

1. Clean Water Act Introduction – Steve Neugeboren (U.S. EPA, OGC)

2. What is the Status and the Future of Waters of the United States? (Meredith)

The status of what is a "water of the United States" is as uncertain as ever. Different legal definitions apply in different states. There are efforts are being made by EPA and the Corps to redefine its meaning, but the agencies are facing obstacles in the courts, and the litigation is ongoing. This panel explores the status of the EPA and Corps' rulemaking efforts, the ongoing litigation, responses to this uncertainty from the states, and what practitioners should know about the current and future implications on permitting and compliance.

3. Are Releases of Pollutants into Groundwater Prohibited by the CWA? (Sam)

Does the CWA prohibit the scenario where pollutants are released from a source and those pollutants eventually enter surfaces waters through groundwater migration? This question has created a torrent of conflicting commentary in the courts, including splits in the federal Courts of Appeal. This panel will explore the nuances of this legal

[PAGE * MERGEFORMAT]

question, the recent court decisions, EPA's request for comment on potential rulemaking and the future EPA administrative actions, litigation trends, and the practical implications.

KEYNOTE: David Ross, Asst. Admin., Office of Water

4. <u>Water Quality Standards: What Does "Compliance" Mean and What Are the Challenges?</u> (Sam)

Water quality standards are a fundamental pillar of the CWA. However, historically, at times, they have been underdeveloped, not fully utilized, or misapplied, depending on your perspective. This panel explores the question: what does "compliance" with water quality standards mean? The question will be examined in the context of permitting, litigation and other developments associated with nutrients, toxic pollutants, federal-state disagreements, enforcement, and other trending developments.

5. CWA Enforcement During the Trump Administration. (Nieredith)

Enforcement is a critical tool of CWA implementation and has traditionally been used as not only a driver for compliance, but used by third-parties to expand the scope and reach of the CWA. There has been much discussion about whether CWA enforcement is less pronounced in the Trump Administration. This panel explores whether that is correct, in part, by examining the EPA enforcement trends, the new EPA and DOJ enforcement policies, State enforcement, and the trends and developments with citizen suits.

Day Two - May 3, 2019

6. <u>Stormwater & Wastewater Management: The Trends and Challenges for the Private and Public Sector.</u> (Rachel)

Stormwater and municipal wastewater pose unique challenges to attaining water quality and these sources have distinct regulatory frameworks under the CWA. Recent developments and various issues that are coming around the corner will create additional complications or opportunities, depending on your perspective. This panel will explore those trending issues, including the litigation and EPA actions related to stormwater runoff from impervious surfaces and the EPA and State use of residual designation authority, stormwater and wastewater permitting and the challenge of addressing water quality, and the future of the regulation of combined sewer systems in the era when their federal consent decrees are terminating, among other issues.

[PAGE * MERGEFORMAT]

7. What are PFAS, Why Do They Matter, and How Are They Regulated? (Rachel)

PFAS – per- and polyfluoroalkyl substances – are a class of man-made chemicals that are notoriously challenging to remediate. PFAS have received a great deal of attention lately, most recently this past summer in Parchment, Michigan, where PFAS in drinking water were found at levels 26 times higher than recommended per a federal health advisory. Congress introduced legislation to spur the removal and remediation of PFAS contamination, and EPA has increased its efforts to identify the presence PFAS in drinking water and other media. But some question whether any of this is enough. One recommendation has been to designate PFAS a contaminant under the Clean Water Act. What might this look like? And absent CWA regulation, what laws apply?

8. Federal and State Governments: Cooperative Federalism in Action. (Meredith)

One constant theme of the Trump Administrative is cooperative federalism. EPA's message is that the States should be in the driver's seat to implement the CWA, with federal oversight, but not day-to-day interference. How does cooperative federalism work in the real world under the CWA, have there been real changes in the relationship between EPA and the States, and where are there friction points and trending developments. This panel explores those issues, including the use of CWA Section 401 by the States, related litigation, and potential EPA administrative actions; the potential for more States to assume the CWA Section 404 program; and state and tribal development and revisions to water quality standards, among other issues.

9. One Piece of the Puzzle: How Does the CWA Fit With Other Federal and State Environmental Statutes? (Sam)

The CWA is one tool to address water quality and protection of the environment. It isn't always clear how the CWA aligns (or does not align) with the other federal and state legal authorities. How does the CWA interplay with, for instance, the federal SDWA, RCRA, and CERCLA? How do state laws on wetlands align with how they are regulated under the CWA? How do state laws on water quantity impact the ability of the CWA to regulate flow to address water quality? Recent developments demonstrate there isn't always alignment, there are implementation concerns, and there are questions about how these authorities are supposed to work together to protect the environment.

10. Ethics. (Rachel)

```
From:
             Maierhofer, Justin C [jcmaierhofer@tva.gov]
             1/16/2018 3:43:13 PM
Sent:
To:
             Ross, David P [ross.davidp@epa.gov]
CC:
             Ayliffe, David Demar [ddayliffe@tva.gov]; Quirk, Sherry Ann [saquirk@tva.gov]
Subject:
             FW: Meeting
David, Sherry and I will be in DC on Thursday afternoon. Would you have a few minutes where we could
come by and pay you a visit?
----Original Message----
From: Ayliffe, David Demar
Sent: Tuesday, January 16, 2018 10:27 AM
To: 'Dravis, Samantha
Cc: Quirk, Sherry Ann; Maierhofer, Justin C; Ross, David P
Subject: RE: Meeting
I appreciate it.
David D. Ayliffe
Senior Attorney
Tennessee Valley Authority
Office of the General Counsel
400 West Summit Hill Drive
Knoxville, Tennessee 37902
865.632.8964
ddayliffe@tva.gov
----Original Message-----
From: Dravis, Samantha [mailto:dravis.samantha@epa.gov]
Sent: Tuesday, January 16, 2018 10:15 AM
To: Ayliffe, David Demar
Cc: Quirk, Sherry Ann; Maierhofer, Justin C; Ross, David P
Subject: Re: Meeting
TVA External Message. Please use caution when opening.
I do not manage his calendar, hence, why I am connecting you.
Sent from my iPad
> On Jan 16, 2018, at 10:14 AM, Ayliffe, David Demar <ddayliffe@tva.gov> wrote:
> Samantha - thank you for your note. If Assistant Administrator Ross has specific time slots available
for a meeting this week with TVA's General Counsel, Sherry Quirk, regarding TVA's appeal in the Sixth
Circuit, please let me know. My understanding is that someone from TVA has already or will be reaching
out soon to schedule.
> Thank you,
> David
> David D. Ayliffe
> Senior Attorney
> Tennessee Valley Authority
> Office of the General Counsel
> 400 West Summit Hill Drive
> Knoxville, Tennessee 37902
> 865.632.8964
> ddayliffe@tva.gov
>
> ----Original Message----
> From: Dravis, Samantha [mailto:dravis.samantha@epa.gov]
> Sent: Tuesday, January 16, 2018 9:49 AM
> To: Ross, David P; Ayliffe, David Demar
> Subject: Meeting
> TVA External Message. Please use caution when opening.
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```
> Dave and David,
>
> Connecting you two to find a time this week to meet on TVA's issue with the Maui brief.
>
> If I am able to join, I will. Thanks in advance!
>
> Best,
> Samantha
>
> Sent from my iPad
```

From:

Sent:

Dravis, Samantha [dravis.samantha@epa.gov]

1/16/2018 3:14:57 PM

```
To:
             Ayliffe, David Demar [ddayliffe@tva.gov]
CC:
             Quirk, Sherry Ann [saquirk@tva.gov]; Maierhofer, Justin C [jcmaierhofer@tva.gov]; Ross, David P
             [ross.davidp@epa.gov]
Subject:
             Re: Meeting
I do not manage his calendar, hence, why I am connecting you.
Sent from my iPad
> On Jan 16, 2018, at 10:14 AM, Ayliffe, David Demar <ddayliffe@tva.gov> wrote:
> Samantha - thank you for your note. If Assistant Administrator Ross has specific time slots available
for a meeting this week with TVA's General Counsel, Sherry Quirk, regarding TVA's appeal in the Sixth
Circuit, please let me know. My understanding is that someone from TVA has already or will be reaching
out soon to schedule.
> Thank you,
> David
> David D. Ayliffe
 Senior Attorney
> Tennessee Valley Authority
> Office of the General Counsel
> 400 West Summit Hill Drive
> Knoxville, Tennessee 37902
> 865.632.8964
> ddayliffe@tva.gov
> ----Original Message----
> From: Dravis, Samantha [mailto:dravis.samantha@epa.gov]
> Sent: Tuesday, January 16, 2018 9:49 AM
> To: Ross, David P; Ayliffe, David Demar
> Subject: Meeting
> TVA External Message. Please use caution when opening.
> Dave and David,
> Connecting you two to find a time this week to meet on TVA's issue with the Maui brief.
> If I am able to join, I will. Thanks in advance!
> Best,
>
 Samantha
> Sent from my iPad
```

From: Dravis, Samantha [dravis.samantha@epa.gov]

Sent: 1/16/2018 2:49:18 PM

To: Ross, David P [ross.davidp@epa.gov]; ddayliffe@tva.gov

Subject: Meeting

Dave and David,

Connecting you two to find a time this week to meet on TVA's issue with the Maui brief.

If I am able to join, I will. Thanks in advance!

Best, Samantha

Sent from my iPad

From: Wildeman, Anna [wildeman.anna@epa.gov]

Sent: 9/19/2018 2:48:01 PM

To: Wildeman, Anna [wildeman.anna@epa.gov]; Penman, Crystal [Penman.Crystal@epa.gov]; McDonough, Owen

[mcdonough.owen@epa.gov]; kbennett@clarkhill.com; Campbell, Ann [Campbell.Ann@epa.gov]; Nagle, Deborah [Nagle.Deborah@epa.gov]; Goodin, John [Goodin.John@epa.gov]; Sawyers, Andrew [Sawyers.Andrew@epa.gov];

Forsgren, Lee [Forsgren.Lee@epa.gov]

CC: Behl, Betsy [Behl.Betsy@epa.gov]; Wood, Robert [Wood.Robert@epa.gov]; Felix-Salgado, Adriana [Felix-

Salgado.Adriana@epa.gov]

Subject: Water Quality Issues Part 2 Call in Ex. 6 Personal Privacy (PP) SSCOOD SSCOOD

Location: 1201 Constitution Ave NW, Washington DC 20004 3233 WJCE Please call 202-564-5700 for escort

Start: 9/20/2018 8:00:00 PM **End**: 9/20/2018 8:45:00 PM

Show Time As: Busy

Karen C. Bennett

CLARK HILL PLC

1001 Pennsylvania Avenue NW, Suite 1300 South | Washington, DC 20004 202.572.8676 (Direct) | 202.255.0291 (Cell) | 202.552.2369 (Fax) KBennett@ClarkHill.com | www.clarkhill.com

Attendee

4pm Meeting:

- 2008 Compensatory Mitigation Rule
- Selenium Aquatic Life Criterion
- Hydrologic Connection
- NPDES Applications and Program Updates Rule
- Power Plant ELGs
- 404(c) Vetoes

From: Wildeman, Anna [wildeman.anna@epa.gov]

7/31/2018 8:42:51 PM Sent:

To: Penman, Crystal [Penman.Crystal@epa.gov]; kbennett@clarkhill.com

Fwd: Meeting Subject:

Hi Karen, I'm copying Crystal Penman on this email. Please provide Crystal some dates and she will work with my calendar to find some time.

Thanks, Anna

Anna Wildeman

Deputy Assistant Administrator

Office of Water

Environmental Protection Agency

1200 Pennsylvania Avenue, NW <x-apple-data-detectors://4/0>

Washington, DC 20460 <x-apple-data-detectors://4/0>

202-564-5700 <tel:202-564-5700>

wildeman.Anna@epa.gov <mailto:Wildeman.Anna@epa.gov>

Begin forwarded message:

From: "Bennett, Karen C." <kbennett@clarkhill.com <mailto:kbennett@clarkhill.com> >

Date: July 31, 2018 at 4:40:02 PM EDT

To: "wildeman.anna@epa.gov <mailto:wildeman.anna@epa.gov> " <wildeman.anna@epa.gov

<mailto:wildeman.anna@epa.gov> >

Subject: Meeting

Hi Anna:

We would like to schedule a meeting to discuss various water quality issues of concern to NMA. Please give me a call or provide available dates.

Thank you,

Karen Bennett

Karen C. Bennett CLARK HILL PLC

1001 Pennsylvania Avenue NW, Suite 1300 South | Washington, DC 20004 202.572.8676 (Direct) | 202.255.0291 (Cell) | 202.552.2369 (Fax)

<mailto:KBennett@ClarkHill.com> KBennett@ClarkHill.com | <http://www.clarkhill.com/> www.clarkhill.com

This email message and any attachments are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by reply email and destroy all copies of this message and any attachments. Please do not copy, forward, or disclose the contents to any other person. Thank you.

9 a.m. Conductivity Meeting

Rob Reash

Penny Shamblin
Paul Balserak
Katharine Crane
Rachel Jones
Jake Tyner
Mike Schon
Dan Byers
Emily Coyner
Ligia Botelho
Louis Baer
Mary Thomas Hart
Roger Claff
William Goodfellow
Rob Beranek
Rachel Rogier
James Boswell
Rusty Ashcraft
John Paul Jones
Steve Schnoor
Rebecca McGrew
Steve Canton
Karen Bennett
Amanda Aspatore

4 p.m. NMA Meeting

Rachel Rogier

James Boswell

Rusty Ashcraft

John Paul Jones

Steve Schnoor

Rebecca McGrew

Adam Diamond

Peter Robertson

Kristen Granier

Steve Canton

Karen Bennett

Amanda Aspatore

From: Penman, Crystal [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP

(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=93662678A6FD4D4695C3DF22CD95935A-PENMAN, CRYSTAL]

Sent: 9/27/2018 6:49:47 PM

To: efisher@eei.org; Sawyers, Andrew [Sawyers.Andrew@epa.gov]; Fotouhi, David [Fotouhi.David@epa.gov]

CC: aaspatore@nma.org; Bond, Alexander [ABond@eei.org]; Chung, David [DChung@crowell.com]; Zobrist, Marcus [Zobrist.Marcus@epa.gov]; Ramach, Sean [Ramach.Sean@epa.gov]; Gutierrez, Sally [Gutierrez.Sally@epa.gov];

Penman, Crystal [Penman.Crystal@epa.gov]; Shimkin, Martha [Shimkin.Martha@epa.gov]

Subject: Hydro Connection Meeting

Attachments: RE: Hydro Connection Issues -- Request for Meeting

Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700

Start: 10/4/2018 3:00:00 PM **End**: 10/4/2018 3:45:00 PM

Show Time As: Busy

From: Penman, Crystal [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP

(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=93662678A6FD4D4695C3DF22CD95935A-PENMAN, CRYSTAL]

Sent: 9/27/2018 6:49:47 PM

To: efisher@eei.org; Sawyers, Andrew [Sawyers.Andrew@epa.gov]; Fotouhi, David [Fotouhi.David@epa.gov]

CC: aaspatore@nma.org; Bond, Alexander [ABond@eei.org]; Chung, David [DChung@crowell.com]; Zobrist, Marcus

[Zobrist.Marcus@epa.gov]; Ramach, Sean [Ramach.Sean@epa.gov]; Gutierrez, Sally [Gutierrez.Sally@epa.gov];

Penman, Crystal [Penman.Crystal@epa.gov]; Shimkin, Martha [Shimkin.Martha@epa.gov]

Subject: Hydro Connection Meeting

Attachments: Real ID Information.pdf; RE: Hydro Connection Issues -- Request for Meeting

Location: 1201 Constitution Ave NW, Washington DC 20004 WJCE 3233 Please call 202-564-5700

Start: 10/4/2018 3:00:00 PM **End**: 10/4/2018 3:45:00 PM

Show Time As: Busy

Alex Bond (also from EEI), Amanda Aspatore from National Mining Association, David Chung from Crowell & Moring Emily Fisher (EEI)

We would like to talk to Anna about the recent decision in the 6th Circuit in the TVA and LG&E cases addressing CWA jurisdiction over groundwater and other related cases.

From: Penman, Crystal [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP

(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=93662678A6FD4D4695C3DF22CD95935A-PENMAN, CRYSTAL]

Sent: 8/15/2018 12:35:10 PM

To: Wildeman, Anna [wildeman.anna@epa.gov]; Penman, Crystal [Penman.Crystal@epa.gov]; McDonough, Owen

[mcdonough.owen@epa.gov]; kbennett@clarkhill.com; Campbell, Ann [Campbell.Ann@epa.gov]; Nagle, Deborah [Nagle.Deborah@epa.gov]; Goodin, John [Goodin.John@epa.gov]; Sawyers, Andrew [Sawyers.Andrew@epa.gov];

Forsgren, Lee [Forsgren.Lee@epa.gov]

CC: Behl, Betsy [Behl.Betsy@epa.gov]; Wood, Robert [Wood.Robert@epa.gov]; Felix-Salgado, Adriana [Felix-

Salgado.Adriana@epa.gov]

Subject: Water Quality Issues Part 2 Call in Personal Phone / Ex. 6 passcode Personal Phone /

Location: 1201 Constitution Ave NW, Washington DC 20004 3233 WJCE Please call 202-564-5700 for escort

Start: 9/20/2018 8:00:00 PM **End**: 9/20/2018 8:45:00 PM

Show Time As: Busy

Karen C. Bennett

CLARK HILL PLC

1001 Pennsylvania Avenue NW, Suite 1300 South | Washington, DC 20004 202.572.8676 (Direct) | 202.255.0291 (Cell) | 202.552.2369 (Fax) KBennett@ClarkHill.com | www.clarkhill.com

Attendee

4pm Meeting:

- 2008 Compensatory Mitigation Rule
- Selenium Aquatic Life Criterion
- Hydrologic Connection
- NPDES Applications and Program Updates Rule
- Power Plant ELGs
- 404(c) Vetoes

From: Fisher, Emily [EFisher@eei.org]

Sent: 9/25/2018 9:09:42 PM

To: Wildeman, Anna [wildeman.anna@epa.gov]

Subject: Hydro Connection Issues -- Request for Meeting

Hi, Anna,

We've spent some time talking to both Matt and Dave about hydrological connection issues and the cases moving through the courts. Given yesterday's decision in LG&E /TVA, I'd really appreciate the opportunity to talk to you about our perspectives on the Supreme Court and the Solicitor General. I know you are swamped, so I promise to make efficient use of your time. Please let me know if there's some time on your calendar for me, Alex Bond, Amanda Aspatore from NMA and David Chung from Crowell & Moring.

Thank you,

Emily

Emily Sanford Fisher
Vice President, Law
Corporate Secretary
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696
202-508-5616
202-731-5887
www.eei.org

Follow EEI on Twitter, Facebook, and YouTube.



From: Wildeman, Anna [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP

(FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=05DD0AF69BFA40429E438B7646502B99-WILDEMAN, A]

Sent: 9/25/2018 9:38:03 PM

To: Fisher, Emily [EFisher@eei.org]

CC: Penman, Crystal [Penman.Crystal@epa.gov]

Subject: Re: Hydro Connection Issues -- Request for Meeting

Hi Emily,

I'd be happy to meet with you on this issue. I've copied Crystal on this so she can work calendars. We should aim for next week if possible.

Thanks!

Anna Wildeman

Deputy Assistant Administrator
Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460
202-564-5700
Wildeman.Anna@epa.gov

On Sep 25, 2018, at 5:09 PM, Fisher, Emily <<u>EFisher@eei.org</u>> wrote:

Hi, Anna,

We've spent some time talking to both Matt and Dave about hydrological connection issues and the cases moving through the courts. Given yesterday's decision in LG&E /TVA, I'd really appreciate the opportunity to talk to you about our perspectives on the Supreme Court and the Solicitor General. I know you are swamped, so I promise to make efficient use of your time. Please let me know if there's some time on your calendar for me, Alex Bond, Amanda Aspatore from NMA and David Chung from Crowell & Moring.

Thank you,

Emily

Emily Sanford Fisher
Vice President, Law
Corporate Secretary
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696
202-508-5616
202-731-5887
www.eei.org

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<image001.png>

